Supreme Court, U.S.
FILED

97 1316 FEB 11 1998

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

v.

FLORIDA POWER CORPORATION and
FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

Arthur J. England, Jr., Esq.*
**Counsel of Record*
Elliot H. Scherker, Esq.
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Panda-Kathleen, L.P.

23 pp

QUESTION PRESENTED

Acting pursuant to, and in furtherance of the congressional objective expressed in the Public Utilities Regulatory Policies Act of 1978 ("PURPA") of encouraging the cogeneration of electric power by small power producers denominated as "qualified facilities," the Florida Public Service Commission (Commission) approved a cogeneration contract between Panda-Kathleen, L.P. (Panda) and Florida Power Corporation (Florida Power). Two years later Florida Power sought to have the Commission rewrite, and effectively invalidate the contract, despite the preemptive effect of PURPA and the Act's express intent that small power generating facilities such as Panda are to be exempt from state regulatory intercession. The Commission acceded to Florida Power's request, and the Florida Supreme Court upheld the Commission in a decision holding that the state's regulatory power was not preempted by the Congress. The court's decision is in irreconcilable conflict with the decisional law announced by every federal and state court to have addressed the preemptive effect of PURPA's exemption of cogeneration and small power production facilities from state utility-type regulation. The question presented is:

Does the Public Utility Regulatory Policies Act of 1978 preempt state regulatory jurisdiction over contract disputes arising from agency-approved contracts for the purchase of power by public utilities from cogenerators and small power producers?

LIST PURSUANT TO RULE 29.6

The parent companies of Panda-Kathleen, L.P. are: Panda Energy International, Inc. (parent corporation); Panda Global Holdings, Inc. (wholly owned subsidiary of Panda Energy International, Inc.); Panda Energy Corporation (wholly-owned subsidiary of Panda Energy International, Inc.); and Panda-Kathleen Corporation (wholly-owned subsidiary of Panda Energy Corporation). Panda-Kathleen Corporation is the general partner of Panda-Kathleen, L.P., the petitioner in this cause.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST PURSUANT TO RULE 29.6 ii

TABLE OF CITATIONS v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. The Florida Power Corporation/Panda-Kathleen Contract 2

B. The Florida Supreme Court's Decision 3

REASON FOR GRANTING THE PETITION 4

A. *PURPA's Exemption of Cogeneration and Small Power Production Facilities From State Utility-Type Regulation* 5

B. *The Florida Supreme Court's Interpretation of PURPA to Allow a Regulatory Agency to Invalidate a QF Contract Conflicts With Other Federal and State Court Interpretations of PURPA* 9

TABLE OF CONTENTS
(Continued)

Page

C. *The Need For Resolution of the Conflicting Precedents* 13

CONCLUSION 15

TABLE OF CITATIONS

Cases **Page**

American Paper Inst. v. American Elec. Power Service
461 U.S. 402 (1983).....9

FERC v. Mississippi
456 U.S. 742 (1982)..... 5, 7

Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners
44 F.3d 1178 (3d Cir.),
___ U.S. ___, 116 S. Ct. 68 (1995) 4, 11, 12, 13

Independent Energy Producers Association, Inc. v. California Public Utilities Commission
36 F.3d 848 (9th Cir. 1994).....9, 11

Kamine/Besicorp Allegany L.P. v. Rochester Gas & Electric Corp.
908 F. Supp. 1180 (W.D.N.Y. 1995)..... 12, 14

Louisiana Public Service Commission v. FCC
476 U.S. 355 (1986)..... 15

Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission
128 Idaho 609, 917 P.2d 766 (1996) 13

Smith Cogeneration Management, Inc. v. Corporation Commission
863 P.2d 1227 (Okla. 1993) 10, 11

TABLE OF CITATIONS
(Continued)

Page

West Penn Power Company v. Pennsylvania Public Utility Commission
659 A.2d 1055 (Pa. Commw. 1995)..... 12, 13, 14

Federal Statutes

16 U.S.C. § 796(17)(A).....5

16 U.S.C. § 796(18)(A).....5

16 U.S.C. § 824a-3 5

16 U.S.C. § 824a-3(b).....8

16 U.S.C. § 824a-3(d).....8

16 U.S.C. § 824a-3(e).....6

16 U.S.C. § 824a-3(g).....8

16 U.S.C. § 824j 14

16 U.S.C. § 824k 14

16 U.S.C. §§ 823a, *et. seq.* 1

28 U.S.C. § 1257(a) 1

Florida Statutes

§ 366.051, Fla. Stat. (1991).....1, 3, 7

TABLE OF CITATIONS
(Continued)

Page

Administrative Regulations

18 C.F.R. § 292.101(b)(6) 9

18 C.F.R. § 292.101, *et. seq.* 7

18 C.F.R. § 292.303 1

18 C.F.R. § 292.304 1

18 C.F.R. § 292.602 1

18 C.F.R. § 292.602(c) 7

Fla. Admin. Code R. 25-17.0832 ..... 1, 2

Fla. Admin. Code R. 25-17.0832(2) 7

Fla. Admin. Code R. 25-17.0832(3) 7

Fla. Admin. Code R. 25-17.0832(3)(a) 2

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA
45 Fed. Reg. 12214 (1980) 14

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner Panda-Kathleen, L.P., respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Florida in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-12a) is reported at 701 So. 2d 322 (Fla. 1997). The orders of the Florida Public Service Commission (App., *infra*, 13a-76a) are reported at 92 FPSC 10:557 (1992), 95 FPSC 12:365 (1995), and 96 FPSC 5:379 (1996).

JURISDICTION

The Supreme Court of Florida issued its decision on September 18, 1997 (App., *infra*, 1a-12a), and denied rehearing on November 13, 1997. (App., *infra*, 77a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 823a, *et. seq.*

18 C.F.R. §§ 292.303, 292.304, 292.602

§ 366.051, Florida Statutes (1991)

Rule 25-17.0832, Florida Administrative Code (1995)

Pursuant to Supreme Court Rule 14(1)(f), the text of the foregoing statutes and regulations is set out in the appendix to this petition. (App., *infra*, 78a-97a).

STATEMENT

A. The Florida Power Corporation/Panda-Kathleen Contract

The petitioner before the Court is Panda-Kathleen, L.P. The respondents are Florida Power Corporation and the Florida Public Service Commission.

On November 25, 1991, Panda and Florida Power entered into a "standard-offer contract," pursuant to which Panda was to provide and Florida Power was to purchase 74.9 megawatts (MW) of cogenerated electricity. (App., *infra*, 1a-2a). The Commission approved Florida Power's petition to accept Panda's contract, and to allow Florida Power to reject several other contract offers, upon a finding that Florida Power "acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed . . . to be the best available." (App., *infra*, 16a).

Two years after securing Commission approval of the Panda contract, Florida Power filed a petition for a declaratory statement under the Florida Administrative Procedures Act, requesting that the Commission rewrite, and effectively invalidate the Panda contract, as being in conflict with certain requirements of Commission Rule 25-17.0832 of the Florida Administrative Code. (App., *infra*, 1a-3a, 90-94a).[1] After being granted leave to intervene, Panda filed a motion to dismiss contending that the Public Utilities Regulatory Policies Act of 1978 preempted the

---

[1] The grounds for rescission asserted by Florida Power were that Panda proposed to construct a cogeneration facility with a total "capacity" of 115 MW, which Florida Power alleged would exceed the 75 MW limit on the amount of power to be "supplied" under cogeneration contracts authorized in Rule 25-17.0832(3)(a); and that the 30-year term expressed in the contract exceeds the "economic plant life" limitation of the Rule (App., *infra*, 2a-3a). The Rules on which Florida Power relied for relief were incorporated into the Panda contract and attached as appendices to the contract, though, at the time of the Commission's earlier approval.

Commission's jurisdiction to hear Florida Power's challenge to the contract, and that Florida Power was required to bring an action in an appropriate court if it wished to avoid its obligations under the agreement. (App., *infra,* 4a, 104a-136a).

The Commission denied Panda's motion to dismiss, ruling that Florida Power's requested relief "does not conflict with federal regulations or subject Panda to 'utility-type' state rate regulations," and that the Commission had jurisdiction to address Florida Power's challenge to the contract. (App., *infra*, 4a, 22a-34a). Following evidentiary hearings, the Commission issued an order ruling that Florida Power's contract with Panda was invalid. (App. 4a-5a, 13a-21a).

B. The Florida Supreme Court's Decision

On direct appeal to the Florida Supreme Court, Panda again contended that the PURPA preempted the Commission's jurisdiction to re-analyze and re-define terms in the Panda/Florida Power contract. (App., *infra,* 5a). Rejecting Panda's claim, the court held that PURPA "contemplates and authorizes the Commission's exercise of jurisdiction to resolve controversies such as this one." (App., *infra,* 7a). The court stated that statutes enacted by the Florida Legislature to implement PURPA vested the Commission with the authority to approve so-called "standard offer" contracts, and to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers." (App., *infra,* 8a), quoting § 366.051, Fla. Stat. (1991). The court held that "it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations." (App., *infra*, 8a-9a). The court found that "[b]oth of the federal and state legislative enactments . . . clearly contemplate that the Commission shall bear the responsibility of resolving such disputes." (App., *infra,* 9a).

The court acknowledged the decision in *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir.), ___ U.S. ___, 116 S. Ct. 68 (1995), in which the Third Circuit struck down state regulatory action that conflicted with PURPA's exemption of qualifying facilities from state regulatory jurisdiction (App., *infra*, 9a-10a), but declined to follow the rationale of *Freehold*:

> We recognize, as did the court in *Freehold*, that utility-type rate regulation is clearly preempted. However, the Florida Commission in its order ruling upon Panda's standard-offer contract, did not engage in utility-type rate regulation. This case involves the construction of conflicting provisions that were included in the contract from . . . its inception, not a modification in the terms of the contract so as to adjust rates paid by consumers.

(App., *infra*, 10a).

REASON FOR GRANTING THE PETITION

The Public Utilities Regulatory Policies Act of 1978 was enacted to foster conservation of resources that are used to produce electricity, as part of an effort to lessen this country's dependence on foreign oil and to combat the energy crisis. A major component of PURPA is the provision for the development of cogeneration and small power production facilities, which the Congress believed would lead to a reduction in demand for traditional fuel resources. Recognizing, however, that traditional utilities would be reluctant to purchase power from nontraditional facilities and, further, that the financial burdens imposed by regulatory intervention would discourage the development of cogeneration and small power production facilities, Congress directed the Federal Energy Regulatory Commission (FERC) to promulgate rules that would exempt such facilities from state and federal regulatory control. In compliance with the congressional mandate, FERC implemented PURPA by promulgating regulations that

exempt cogeneration and small power production facilities from traditional state utility regulation.

By approving Florida Power's attempt to escape its contractual duties under a cogeneration agreement that had been expressly approved by the Commission under regulations adopted to implement both PURPA and FERC's rules, the Florida Supreme Court has transgressed upon the congressional mandate, and has announced a rule of law that irreconcilably conflicts with the decisional law announced by every federal and state court to have addressed the preemptive effect of PURPA. The Florida Supreme Court's rationale, if not disapproved by the Court, will all but undo the expressly-stated congressional intent to facilitate the development of alternative energy resources. Both the decisional disharmony and the importance of carrying out the intent of the Congress commend this matter to the Court's attention.

A. *PURPA's Exemption of Cogeneration and Small Power Production Facilities From State Utility-Type Regulation*

Section 210 of PURPA, codified as 16 U.S.C. § 824a-3, addresses the role of cogeneration and small power production facilities in PURPA's overall scheme for the conservation of fuel resources.[2] In *FERC v. Mississippi*, 456 U.S. 742 (1982), this Court set forth both the underlying congressional intent and the correlative provisions of PURPA:

> Section 210 . . . seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would

---

[2] A "cogeneration facility" produces both electrical energy and steam (or some other form of useful energy, such as heat). 16 U.S.C. § 796(18)(A). A "small power production facility" produces no more than 80 MW and uses either waste or renewable resources to produce electric power. 16 U.S.C. § 796(17)(A).

> reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.
>
> In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities . . . .
>
> To solve the second problem perceived by Congress, § 210(e), 16 U.S.C. § 824a-3(e), directs FERC to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities.

456 U.S. at 750-51 (footnotes omitted). Section 210 directs FERC to promulgate regulations, pursuant to which a qualifying cogeneration or small power production facility (commonly referred to as a Qualified Facility or "QF") shall be "exempted in whole or part . . . from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production." 16 U.S.C. § 824a-3(e)(1).

In *FERC v. Mississippi,* the Court verified the preemptive authority of Section 210 by rejecting Mississippi's Tenth Amendment challenge:

> Insofar as § 210 authorizes FERC to exempt qualified power facilities from "State laws and regulations," it does nothing more than pre-empt conflicting state enactments in the traditional way. Clearly, Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators . . . . [T]he Federal Government may displace state regulation even though this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."

456 U.S. at 759 (citations omitted). Executing its responsibility under PURPA, FERC promulgated regulations to enable Section 210, including a provision that QFs are exempt "from State law or regulation respecting: i) [t]he rates of electric facilities; ii) [t]he financial and organizational regulation of electric utilities." 18 C.F.R. § 292.602(c); 18 C.F.R. § 292.101, *et. seq.*

In accordance with PURPA, the Florida Legislature directed the Commission to "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers." § 366.051, Florida Statutes (1991). The Commission, in turn, promulgated an administrative rule that adopts two contracting methodologies to implement PURPA's design: (1) the "negotiated contract," in which a utility directly negotiates with a QF for the purchase of power; and (2) the "standard offer contract," which, once submitted by a QF must be accepted by the utility absent affirmative permission from the Commission to reject the contract. Rule 25-17.0832(2), (3), Fla. Admin. Code.

In conformity with the Commission's regulations, Panda submitted a standard offer contract to Florida Power, with all of its contractual term specified and the

Commission's rules incorporated by reference. In due course, the contract was submitted to the Commission with Florida Power's request that it be approved, and that other proposed standard offer QF contracts be rejected. (App., *infra,* 14a). The Commission granted Florida Power's petition, finding that Florida Power had "acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by [Florida Power] to be the best available." (App., *infra,* 16a).

Under 16 U.S.C. § 824a-3(b), state regulatory rules cannot provide for a QF rate "which exceeds the incremental cost to the electric utility of alternative electric energy," defined as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d) (referenced as the "avoided cost"). State regulatory agencies are thus required to promulgate rules to ensure that QF rates comply with these requirements. 16 U.S.C. § 824a-3(b). The Commission's action in approving Panda's standard offer contract, and the underlying Commission regulations that were followed in that process, were completely consistent with PURPA's mandate.

No one disputes that the Commission was acting well within its proper role under PURPA in reviewing and approving Panda's standard offer contract. When the Commission some two years later effectively *invalidated* the contract it had already approved, based on a conflict in the very terms it had previously seen and approved, however, it went far beyond its authority to *implement* QF contracts. It patently entered into the forbidden realm of utility-type regulation.

PURPA specifically provides that disputes arising from QF contracts are subject to *judicial* review, just as any contract dispute would ordinarily be resolved between private parties. 16 U.S.C. § 824a-3(g). Congress did not declare, and rationally could not have directed the creation of preemptive federal regulatory requirements, and at the same time contemplate intercession by state regulatory

bodies to revisit previously-approved contract terms so that power companies can escape the very contracts PURPA fostered.

B. *The Florida Supreme Court's Interpretation of PURPA to Allow a Regulatory Agency to Invalidate a QF Contract Conflicts With Other Federal and State Court Interpretations of PURPA*

The Florida Supreme Court's allowance of state regulatory interference with approved QF cogeneration contracts runs contrary to established precedent on PURPA's preemptive effect. The case law draws a bright-line distinction between the role of state agencies in approving QF contracts and post-contractual interference. The Commission's action against Panda, which effectively invalidated terms expressed in the Commission-approved QF contract between Panda and Florida Power, clearly falls on the preempted side of the distinguishing line.

An unbroken line of federal and state precedent has invalidated similar state regulatory efforts to interfere with approved QF contracts. These decisions largely have involved state efforts to modify QF rates set pursuant to PURPA's requirement that rates under a QF contract may not exceed the "incremental costs" of purchasing alternative electric energy, which FERC defined as "avoided costs," *i.e.*, costs for electric energy which, but for the purchase from the QF, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6).[3]

In *Independent Energy Producers Association, Inc. v. California Public Utilities Commission,* 36 F.3d 848 (9th Cir. 1994), the court addressed the validity of a California regulatory provision that authorized utilities to suspend payments of contractual rates under approved cogeneration contracts and to substitute lower rates, upon a determination

---

[3] In *American Paper Inst. v. American Elec. Power Service,* 461 U.S. 402, 412-18 (1983), the Court upheld FERC's requirement that QFs receive the full avoided cost rates.

that the QF had failed to meet federal operating and efficiency standards. 36 F.3d at 849-50. The Ninth Circuit recognized that, under PURPA, "the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated" by FERC. 37 F.3d at 856. Nonetheless, the court held that the California regulation "violates PURPA by substituting for any 'non-complying' QF and 'alternative' avoided cost rate." *Id.* at 854.

This holding was based on the fundamental proposition that the states do not have "the authority to alter the terms of standard offer contracts" when such rulings have the effect of *invalidating* a previously-approved QF contract. *Id.* at 858-59. Fully recognizing that utilities may, on occasion, be "lock[ed] . . . into paying rates that were calculated on incorrect assumptions about the future costs of fossil fuels," the court nonetheless held that the fact of lower than anticipated avoided costs "does not give the state and the [utility] the right *unilaterally* to modify the terms of the standard offer contract." *Id.* at 858 (emphasis added).

To like effect is the decision of the Supreme Court of Oklahoma in *Smith Cogeneration Management, Inc. v. Corporation Commission,* 863 P.2d 1227 (Okla. 1993). The regulation at issue in *Smith* required utilities and cogenerators "to include in each contract a notice provision that allows the Corporation Commission to change the terms and otherwise finalize experimental purchase tariffs of a power sales agreement throughout the duration of the contract." *Id.* at 1237 n.35. Challenging the rule, the cogenerator in *Smith* asserted that, "while states have broad authority to implement PURPA, any utility-type regulation over cogeneration contracts directly conflicts with the Act. *Id.* at 1237. The Oklahoma court agreed:

> Reconsideration of long-term contracts with established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to prevent reconsideration of such contracts. The

> legislative history behind PURPA confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by qualifying facilities to utilities. . . .
>
> * * *
>
> . . . Requiring QFs and electric utilities to include a notice provision allowing reconsideration of established avoided costs conflicts with PURPA and FERC regulations. Such a requirement makes it impossible to comply with PURPA and FERC regulations requiring established rate certainty for the duration of long term contracts for qualifying facilities that have incurred an obligation to deliver power. . . .

863 P.2d at 1240-41 (footnote omitted).

In *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of State of New Jersey*, 44 F.3d 1178 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 68 (1995), the Third Circuit applied the precepts set forth in *Independent Energy Producers* and *Smith* to invalidate a state regulatory agency's attempt to rescind a QF contract. Freehold, a QF, had negotiated a power purchase agreement with a New Jersey public utility which was approved by the state's Board of Regulatory Commissioners (the BRC). *Id.* at 1182-83. Approximately one year later, "in response to decreases in the cost of obtaining electrical power, the BRC directed public utilities to notify it of any power supply contracts which were no longer economically beneficial," so that the BRC could encourage "buy outs" and other remedial measures. *Id.* at 1183. Freehold resisted a buy out proposal, but the BRC directed the parties "to renegotiate" the contract or a buy out, failing which an evidentiary hearing would be conducted to consider alternative measures, in response to the utility's argument that the contract "was no longer an economically beneficial contract because the contractual avoided cost was significantly higher than the current avoided cost." *Id.*

The Third Circuit analyzed the state's power under Section 210(f) of PURPA "to implement the requirements of section 210(a) and the relevant regulations," and concluded that contract re-examination is prohibited in "utility-type" regulation:

> Here, on the other hand, the BRC's implementation of FERC's section 210(a)-type regulations *ended with the BRC's . . . approval* of the PPA [the contract]. The present attempt to either modify the PPA or revoke BRC approval is "utility-type" regulation — exactly the type of regulation from which Freehold is immune under section 210(e). . . .

Id. at 1191-92 (emphasis added). Thus, "once the BRC approved the power purchase agreement . . . on the ground that the rates were consistent with avoided cost, *any action or order by the BRC to reconsider its approval*" was preempted by PURPA. *Id.* at 1194 (emphasis added).

Freehold has been accepted as the controlling interpretation of PURPA preemption. *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Electric Corp.*, 908 F. Supp. 1180, 1189-90 (W.D.N.Y. 1995); *West Penn Power Company v. Pennsylvania Public Utility Commission,* 659 A.2d 1055, 1065-66 (Pa. Commw. 1995). No reported decision, prior to the Florida Supreme Court's decision in this case, appears to have authorized a state agency to modify a previously-approved QF contract — much less to

virtually rescind such a contract under PURPA.[4] The distinction drawn by the Florida Supreme Court between "utility-type regulation" and "the construction of conflicting provisions that were included in the contract from . . . its inception" (App., *infra*, 9a-10a), is simply not one that can be reconciled with PURPA or the extant law. A "construction" of contract terms which has the intended effect of excusing the utility's performance altogether, as here, is the heart and soul of agency oversight, and directly contrary to PURPA's consignment of contract disputes to the courts. As the Pennsylvania court held in *West Penn Power Company*:

> Section 210 of PURPA preempts the [state commission] from *reconsidering its prior approval* of the [contracts] between West Penn and the QFs *or* to change the rates established for the avoided costs at the time of the agreements. Unless or until PURPA is amended or repealed, reestablishing regulatory power over the area, it appears that the [state commission] *cannot reexamine contracts* for PURPA power. . . .

659 A.2d at 1066 (emphasis added).

C. *The Need For Resolution of the Conflicting Precedents*

PURPA was expressly intended to create a market for QFs to sell their energy to established utilities by requiring

---

[4] In *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 917 P.2d 766 (1996), the court declined to reverse a regulatory order under *Freehold* because the order was an interim measure that preceded actual *approval* of the QF contract. 917 P.2d at 779. The court distinguished *Freehold* as involving an attempt "to reopen a power purchase agreement" after "[t]he executed agreement had previously been approved by the BRC," whereas in *Rosebud*, "no contractual agreement had been entered into, nor had the [state commission] previously approved avoided costs specific to [the proposed contract]" prior to entering the order sought to be quashed. *Id.*

utilities to purchase power from QFs "whether they want to or not." *Kamine/Besicorp Allegany*, 908 F. Supp. at 1189. Indeed, so overriding was the congressional desire to implement cogeneration and small power production contracts that FERC, in promulgating its regulations to enable PURPA, fully recognized and expressly acknowledged that although a utility might in a particular instance pay more than the actual avoided cost, such is an acceptable consequence of implementing PURPA's goals. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA*, 45 Fed. Reg. 12214, 12224 (1980). Not surprisingly, major utility companies have been reluctant "to be forced into this 'marriage.'" *Kamine/Besicorp Allegany*, 908 F. Supp. at 1189. That reluctance has undoubtedly engendered the recent spate of PURPA suits in which utilities, such as Florida Power here, have asked their regulators to alleviate economic consequences they did not fully appreciate and do not now desire.

As the court observed in *West Penn Power Company*, however, "PURPA had the unintended consequence of promoting competition in the electric industry in that non-utility, independent power producers are entering the market to supply electrical power both to utilities and to large customers." 659 A.2d at 1059. The Energy Policy Act of 1992, 16 U.S.C. §§ 824j, 824k, was enacted to confer upon FERC "certain powers to open the wholesale electrical market. 659 A.2d at 1059. Traditional monopolistic utilities are concerned that increased competition will leave them with "stranded investment," *i.e.*, "that portion of capacity which has capital costs and operating costs so great that the power is produced at a cost that will not be competitive in the coming competitive market place." *Id.* That concern is "at the core of the disputes concerning PURPA contracts taking place before courts and regulatory bodies throughout this country." *Id.* Utilities fear that "QFs will supply energy that the utility no longer needs because customers have walked away with their demand and are purchasing from independent power producers or that the avoided costs paid for QF power is at a cost higher than the cost of power that may become

available" to the customer in a more competitive market place. *Id.*

Congress, however, has neither amended nor repealed PURPA, and the courts have hewn closely to PURPA's intent by rejecting the efforts of utilities to chip away at its preemptive effects. The Florida Supreme Court's decision is the first break in the bulwark of protection erected by the courts around PURPA's core purposes and provisions. This opening, if exploited by traditional utilities — as it undoubtedly will be — will eventually become the means by which section 210 of PURPA will lose all vitality.

Federal preemption is at the very heart of the Supremacy Clause. *E.g., Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 368-69 (1986). Where express congressional preemptive intent has been ignored by a state court, as here, it is essential that the Court step in to vindicate the will of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Arthur J. England, Jr., Esq.*
**Counsel of Record*
Elliot H. Scherker, Esq.
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Panda-Kathleen, L.P.

Dated: February 11, 1998

Supreme Court, U.S.
FILED

971316 FEB 11 1998

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

v.

FLORIDA POWER CORPORATION and
FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Arthur J. England, Jr., Esq.*
**Counsel of Record*
Elliot H. Scherker, Esq.
Greenberg Traurig Hoffman
Lipoff Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Panda-Kathleen, L.P.

131 pp

TABLE OF CONTENTS

Page

Opinion of the Supreme Court of Florida in *Panda-Kathleen, L.P. v. Clark*, 701 So. 2d 322 (Fla. 1997) 1a

Order Granting Petition for Authority for Florida Power Corporation to Refuse All Standard Offer Contracts Except That Submitted by Panda Kathleen, L.P. in Florida Public Service Commission Docket No. 911142-EQ 13a

Order Denying Motion to Dismiss and Motion to Stay or Abate Proceedings in Florida Public Service Commission Docket No. 950110-EI 22a

Final Order Clarifying Standard Offer Contract in Florida Public Service Commission Docket No. 950110-EI 35a

Order Denying Rehearing in *Panda-Kathleen, L.P. v. Clark*, 701 So. 2d 322 (Fla. 1997) 77a

16 U.S.C. § 924a-3(a)-(h) 78a

18 C.F.R. §§ 292.303-304 ..... 84a

Fla. Admin. Code R. 25-17.0832(3) 90a

§ 366.051 Fla. Stat. (1995) 95a

TABLE OF CONTENTS
(Continued)

Page

18 C.F.R. § 292.602 ..... 97a

Petition for Declaratory Statement in Florida Public Service Commission Docket 98a

Motion to Stay or Abate Proceedings, Motion to Dismiss and Supporting Memorandum in Florida Public Service Commission Docket No. 950110-EI 104a

SUPREME COURT OF FLORIDA

Panda-Kathleen, L.P./Panda
Energy Corporation,

Appellant, No. 88,280

vs.

Susan F. Clark, et al., as the Florida
Public Service Commission, and
Florida Power Corporation,

Appellees.

[September 18, 1997]

Wells, J.

Panda-Kathleen, L.P./Panda Energy Company (Panda) appeals Order No. PSC-96-0671-FOF-E1 of the Florida Public Service Commission (the Commission) regarding Panda's standard-offer contract with Florida Power Corporation (FPC) to provide electricity through the process of cogeneration. We have jurisdiction. Art. V, § 3(b)(2), Fla. Const. For the reasons expressed, we find that the Commission had jurisdiction and affirm the Commission's order holding that the Commission's jurisdiction is proper and that Order No. PSC 96-0671-FOF-E1 is affirmed.

This action was commenced at the Commission on January 25, 1995, when FPC filed a petition for declaratory statement regarding certain aspects of its standard-offer cogeneration contract with Panda. On November 25, 1991, Panda and FPC entered into the standard-offer contract at issue, which required Panda to provide and FPC to purchase 74.9 megawatts of cogenerated electricity at all times while the contract was in effect. The contract was entitled "Standard Offer for the Purchase of the Firm Capacity and Energy from a Qualifying Facility Less than

75 megawatts or a Solid Waste Facility." The contract incorporated the Commission's rules pertinent to cogeneration contracts, including rule 25-17.0832, Florida Administrative Code. The contract also incorporated appendices. The Commission approved the contract on October 22, 1992. *In re Fla. Power Corp.*, Docket No. 91142-EQ, Order No. PSC 92-1202-FOF-EQ (F.P.S.C. Oct. 22, 1992).

Among the rules that were incorporated were Commission rule 25-17.0832(3)(a), which referred to "the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts," and Commission rule 25-17.0832(3)(e)6., which stated:

> [T]he period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility [is] . . . [a]t a maximum . . . equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit[.]

The Commission's rules derive from section 366.051, Florida Statutes (1991), which is consistent with the cogeneration provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §§ 824-824m (1994), and which provides that qualifying facilities (QFs) such as Panda can sell energy to utility companies at but not exceeding full avoided cost. "Avoided cost" is the cost that a utility avoids by purchasing electrical power from a QF rather than generating the electrical power itself or purchasing the power from another source. Schedule 2 to appendix C of this contract identified the economic plant life of the unit avoided by this contract as equal to twenty years.

FPC's petition before the Commission alleged that Panda proposed to construct a cogeneration facility of 115 megawatts and that, by reason of having typed within a blank space on the contract a contract expiration date of 2025, Panda was asserting the right to capacity payments for a period of time exceeding by ten years the twenty-year economic plant life of the avoided unit. The petition sought

an order declaring (1) that the standard offer contract is not available if Panda configures its facility to have a capacity in excess of seventy-five megawatts, and (2) that if the Commission determines that the contract remains available to Panda, FPC has no obligation under the contract to make any payments to Panda after December 2016, the end of the twenty-year life of the avoided unit.

On February 6, 1995, Panda sought to intervene in the declaratory statement proceeding before the Commission. The Commission granted intervention on March 6, 1995. On March 14, 1995, Panda filed a motion for declaratory statement seeking an order declaring Panda's proposed 115-megawatt facility to be consistent with rule 25-17.0832(3)(a) and declaring that the contract the Commission had previously approved provided for a thirty-year time period of payments. On June 29, 1995, Panda filed a petition for a formal evidentiary proceeding and full commission hearing. In their respective pleadings, FPC and Panda each acknowledged the Commission's jurisdiction to adjudicate those issues related to the contract, with Panda specifically asserting in its petition for evidentiary and full commission hearings that "the Commission has the right, and in these circumstances the obligation, to convene and conduct a formal evidentiary proceeding pursuant to section 120.57(1), Florida Statutes."

However, on September 12, 1995, in an apparent change of position, Panda filed a motion to dismiss and motion to stay or abate proceedings. Panda asserted that PURPA preempted the Commission's jurisdiction as to issues involving a standard-offer contract arising after the Commission's initial approval of the contract and that such issues must be decided by a court of competent jurisdiction. By order dated December 27, 1995, the Commission denied Panda's motions. The Commission stated in its order:

> The relief FPC has requested here does not conflict with federal regulations or subject Panda to "utility-type" state rate regulation. It seeks an answer to two questions: 1) Under the provisions of Rule 25-17.0832(3)(a), Florida Administrative Code, as applied to the standard offer at issue, is

> Panda permitted to build a cogeneration facility larger than 75MW; 2) Under the provisions of Rule 25-17.0832(3)(e)(6), Florida Administrative Code, as applied to the standard offer at issue, is Florida Power obligated to make firm capacity and energy payments to Panda for more than 20 years. Certainly we have the authority to answer those questions.

In re Panda-Kathleen, L.P., Docket No. 950110-EI, Order No. PSC 95-1590-FOF-EI (F.P.S.C. Dec. 27, 1995).

An evidentiary hearing was held in February 1996. The Commission issued an order on May 20, 1996, in which it determined: (1) that Panda's proposed 115-megawatt facility does not comply with rule 25-17.0832, Florida Administrative code; (2) that FPC is only responsible for firm capacity payments to Panda and eligible for cost recovery of those payments for twenty years in compliance with rule 25-17.0832; (3) that Panda will only be responsible for supplying firm capacity for twenty years; (4) that the contractual milestone dates are extended by a period of time equal to the time necessary for deciding matters in this docket, which was determined to be a period of eighteen months; and (5) that Panda should receive a twenty-year capacity payment stream, using the payment stream in appendix C, schedule 3, for the standard-offer contract to set a net present value of approximately $71 million in 1996, with FPC being directed to file a new capacity payment stream for administrative approval within thirty days of issuance of the Commission order. Order No. PSC-96-0671-FOF-EI.

Panda raises three issues in this appeal. First, Panda asserts that, under PURPA, federal preemption precludes the Commission's jurisdiction to determine that the contract between Panda and FPC is invalid and that any issue of contract interpretation must be left to the courts. Panda maintains that because the Commission approved the contract exactly as written, FPC cannot ask the Commission to rewrite or interpret the contract or to invoke approval of the contract. Second, Panda contends that even if the Commission has jurisdiction to hear the petitions, the

Commission must conclude that the contract permitted Panda to build the facility as proposed and to receive capacity payments for thirty years, the stated duration of the contract. Third, Panda argues that FPC waived its rights and was estopped from arguing its position and prevailing because of FPC's conduct from 1991 through 1994 in proposing, entering into, and beginning performance of the contract which permitted a facility of the size that Panda proposed and which required payment for a period of thirty years. Panda does not claim that the Commission erred in respect to extending the milestone dates.

In response, the Commission and FPC contend that PURPA, by its express language, does not preempt the rules which they contend control this controversy. The appellees point to the language of PURPA found in 16 U.S.C. § 824a-3(e)(3)(A),[1] and also argue that the United States Supreme Court upheld a similar application of PURPA in *Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742 (1982), and, therefore, the Commission has jurisdiction. As to the second issue, the appellees argue that the Commission has the power under PURPA and decisions of this Court to enforce its own rules regarding contract duration which were part of and which governed the standard-offer contract. As to Panda's third issue, the Commission contends that the waiver and estoppel argument is fundamentally irrelevant because the

---

[1] 16 U.S.C. § 824a-3(e)(3)(A)(1994), provides:

(e) Exemptions

* * * *

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from —

(A) any State law or regulation in effect in a State pursuant to section (f) of this section

. . . .

operation of the standard offer contract must comply with the Commission's rules incorporated in it, any contrary understandings of the parties notwithstanding.

We affirm the Commission's order. As we did in *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So. 2d 716 (Fla. 1983), we begin by noting that we presume orders of the Commission to be correct, and we only determine whether the Commission's action comports with the essential requirements of law and is supported by competent, substantial evidence. *Id.* at 717.

As to the Commission's jurisdiction to resolve this dispute concerning provisions of a standard-offer contract, we conclude that PURPA contemplates and authorizes the Commission's exercise of jurisdiction to resolve controversies such as this one. In reaching this conclusion, we rely upon the United States Supreme Court's interpretation of state regulatory jurisdiction under PURPA in *Federal Energy Regulatory Commission v. Mississippi*, which states:

> Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.
>
> In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory

> authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities. Section 210(f), 16 U.S.C. § 824a-3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules. And § 210(h), 16 U.S.C. § 824a-3(h), authorizes FERC to enforce this requirement in federal court against any state authority or nonregulated utility; if FERC fails to act after request, any qualifying utility may bring suit.
>
> To solve the second problem perceived by Congress, § 210(e), 16 U.S.C. § 824a-3(e), directs FERC to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities.
>
> Pursuant to this statutory authorization, FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. *These afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented. Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.*

456 U.S. at 750-51 (footnotes omitted) (citations omitted) (emphasis added).

In Florida, PURPA is implemented by consistent state policy authorized by section 366.051, Florida Statutes (1991). In *Florida Power & Light Co. v. Beard*, 626 So.

2d 660 (Fla. 1993), we recognized that section 366.051 vested the Commission with authority to review standard offer contracts "to ensure that they are fair to the parties to the contract and that they further the energy policies of the State as defined by the Legislature." *Id.* at 663. One of the energy policies defined by the legislature is the encouragement of cogeneration and small power production by directing that utilities "shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator." § 366.051, Fla. Stat. (1991). The legislature further provided that "[t]he commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers." § 366.051, Fla. Stat. (1991).

In accord with this legislative directive, the Commission adopted relevant portions of FERC's PURPA rules, and it further promulgated rules 25-17.080 through 25-17.091, Florida Administrative Code. These rules are incorporated in this standard-offer contract. Specifically, rule 25-17.0832(3)(a) requires participating QFs to have less than 75-megawatt capacity and establishes that the period of time for delivery be equal to the anticipated plant life of the avoided unit. We believe it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations. Our conclusion naturally flows from the United States Supreme Court's additional statement in *Federal Energy Regulatory Commission v. Mississippi*:

> In essence, then, the statute and the implementing regulations simply require [state] authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission.

Id. at 760.

This is likewise the type of activity in which the Florida Public Service Commission is engaged.

Furthermore, we agree with the Commission that to forbid the Commission to resolve disputes concerning its rules pertaining to cogeneration would render the Commission powerless to limit standard-offer contracts to small QFs with capacity of less than seventy-five megawatts or to fulfill its obligation under both federal and state statutes to limit capacity payments to avoided costs. Both of the federal and state legislative enactments as well as the judicial decisions applying the statutes clearly contemplate that the Commission shall bear the responsibility of resolving such disputes.

We find *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1995), the case upon which Panda primarily relies in arguing against Commission jurisdiction, to be factually distinguishable. In *Freehold*, the board was not construing and implementing its own regulations. Rather, that case involved utility-type regulation in the form of efforts of the New Jersey regulatory commission to induce a cogenerator to renegotiate a reduction in the amount of capacity payments to save money for ratepayers. *Id.* at 1183. The Court held that Freehold's pleading sufficiently alleged utility-type rate regulatory action by the state regulatory commission in conflict with PURPA's exemption of QFs from state law regulating rates of electric utilities. *Id.* at 1190. The court concluded that once the commission approved the power purchase agreement on the ground that the rates were consistent with avoided costs, any action or order by the commission to reconsider its approval or to deny the passage of those rates to the utilities consumers was preempted by federal law. *Id.* at 1194. We recognize, as did the court in *Freehold*, that utility-type rate regulation is clearly preempted. However, the Florida Commission in its order ruling upon Panda's standard-offer contract, did not engage in utility-type rate regulation. This case involves the construction of conflicting provisions that were included in the contract from . . . its inception, not a modification in the terms of the contract so as to adjust rates paid by consumers.

Moving to Panda's second issue, we find that the regulations and the contract specify a contract for a facility

with a capacity less than seventy-five megawatts. The Commission has interpreted the 75-megawatt threshold as applying to the "total net capacity" of a QF rather than the "committed capacity" sold by a QF pursuant to a standard offer contract. *In re Petition of Polk Power Partners, L.P. Ltd.*, Docket No. 920556-EQ, Order No. PSC 92-0683-DS-EQ (F.P.S.C. July 21, 1992).[2] We give great deference to the Commission's interpretation of its own rules and will not disturb that interpretation unless the interpretation is shown to be clearly erroneous. *Pan American World Airways, Inc.*, 427 So. 2d at 719. Applying the Commission's construction of its rule, we conclude that there is competent, substantial evidence to support the Commission's finding that Panda does not need a 115-megawatt facility to serve its standard offer contract and that, therefore, Panda's proposed QF does not comply with rule 25-17.0832, Florida Administrative Code, which is incorporated into the contract.

We next consider the Commission's order that the duration of capacity payments to Panda be limited to twenty years. This issue brings into focus the issue of which provision of a standard-offer contract controls when a typed-in provision directly conflicts with the Commission's rules and the appendices which are incorporated into the contract. In this case, Panda typed in a termination date of March 2025, thirty years from the early in-service date that Panda originally requested. As earlier noted, rule 25-17.0832(3)(e)6., Florida Administrative Code, establishes that, under the contract, electrical power equal to firm capacity of the QF shall be delivered for a period of time equal to the anticipated plant life of the utility's avoided power-production unit. Appendix C, schedule 2, shows that the economic plant life of FPC's avoided unit is twenty years. The problem presented here is that the Commission approved the contract with the apparently conflicting provisions of thirty-year and twenty-year terms. The

---

[2] Panda argues that the Commission should not apply its *Polk Power* definition retroactively. However, the Commission points out that its *Polk Power* order is dated July 21, 1992, and the Panda standard-offer contract is dated October 22, 1992.

Commission resolved this conflict by determining that its rule controlled. The Commission rejected an interpretation of the contract offered by FPC's expert that the contract term is thirty years, but since the economic life of the avoided unit is only twenty years, the contract only requires FPC to purchase as-available energy starting in year twenty-one. Rather, the Commission determined that it was required by PURPA and its own rules to ensure that utilities pay no more than the cost avoided by purchasing power from the QF and that the Commission would resolve the ambiguity created by the conflict between the typed-in provision, the rule, and the appendices, by giving effect to the rule. Thus, the Commission held that FPC is only required to make capacity payments for twenty years in accordance with the rule and that Panda is only responsible for supplying firm capacity for twenty years.

We find that the Commission's decision did not deviate from the essential requirements of law and that the decision conformed to the intent of PURPA and the Commission's rules. Moreover, we conclude that if the Commission had not resolved the conflict created by the Commission's approval of a contract term conflicting with the Commission's rule as to avoided cost, then the contract would have violated PURPA and section 366.051, Florida Statutes (1991). In sum, the Commission had the power to and did correct its own mistake regarding contract duration.[3]

Finally, as to Panda's third issue contending that FPC's conduct from 1991 through 1994 created an estoppel, we agree with the Commission that FPC's conduct and any understandings of the parties contrary to the Commission's rules are irrelevant to the Commission's enforcement of its rules. Our determination rests on whether the Commission's construction of its rules departed from the essential requirements of law and whether its decision was based on competent, substantial evidence. We will not reweigh or reevalaute the evidence presented to the

---

[3] Construction of the Panda QF had not begun when the Commission's correcting order of May 20, 1996, was entered.

Commission. *McCaw Communications of Florida, Inc. v. Clark*, 679 So. 2d 1177, 1178 (Fla. 1996).

For the reasons stated, we affirm the order of the Commission.

It is so ordered.

KOGAN, C.J., and OVERTON, GRIMES, HARDING and ANSTEAD, JJ., concur. SHAW, J., dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An appeal from the Public Service Commission

Arthur J. England, Jr., David L. Ross, and Joe N. Unger of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, Florida,

for Appellant

Robert D. Vandiver, General Counsel and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, Tallahassee, Florida; James A. McGee and Jeffrey A. Froeschle, Office of the General Counsel, Florida Power Corporation, St. Petersburg, Florida; and Alan C. Sundberg and Sylvia H. Walbolt of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., St. Petersburg, Florida,

for Appellees

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In re: Petition for)	Docket No. 911142-EQ
Authority for Florida)	Order No. PSC-92-1202-FOF-EQ
Power Corporation)	Issued: 10/22/92
to Refuse all Standard)	
Offer Contracts)	
Except that submitted)	
by Panda Kathleen,)	
L.P.)	
_____)	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER GRANTING PETITION FOR AUTHORITY FOR FLORIDA POWER CORPORATION TO REFUSE ALL STANDARD OFFER CONTRACTS EXCEPT THAT SUBMITTED BY PANDA KATHLEEN, L.P.

BY THE COMMISSION:

CASE BACKGROUND

In Docket No. 910004-EU, the Commission determined that FPC's avoided unit for its standard offer contract was a 1997 combustion turbine. The standard offer subscription limit was set at 80 MW, with an effective date of September 20, 1991.

FPC conducted a two week "open season" from September 20, 1991, to October 4, 1991, during which potential providers were to submit standard offer contracts

for evaluation. FPC received nine contracts during its "open season" and one contract after the "open season" concluded. On November 19, 1991, FPC petitioned the Commission for authority to reject the first standard offer contract it had received on September 20, 1991, from Noah IV GP, Incorporated (Noah IV). Subsequently, on November 26, 1991, FPC filed a petition with the Commission for authority to refuse all standard offer contracts except the one submitted by Panda Kathleen L.P. This petition also included rejection of Noah IV's contract. The two petitions have been combined into this single docket, Docket No. 911142-EQ.

On December 13, 1991, Noah IV and Ark Energy, Incorporated (Ark), jointly filed an Answer and Cross-Petition to FPC's petition. In the petition, Noah IV and Ark requested the Commission to reject FPC's petition and either (1) order FPC to execute, the standard offer contract submitted by Noah IV to FPC or (2) set the matter for hearing. Subsequently, counsel for Noah IV and Ark agreed to permit the petition by FPC to be treated as a Proposed Agency Action. At the February 18, 1992, agenda conference, the Commission voted unanimously to approve the staff recommendation to approve FPC's petition, but to keep the standard offer open until the remaining 5.1 MW are subscribed.

Noah IV and Ark timely filed a protest to the Notice of Proposed Agency Action. A hearing was held on the matter on June 29, 1992. All parties submitted post hearing filings. In addition to its forty two page brief, ARK/NOAH IV submitted forty proposed Findings of Fact. Recommendations for rulings on each specific Finding of Fact are included in this Order as Attachment I. ARK/NOAH IV also submitted 11 proposed Conclusions of Law. We believe these conclusions are redundant in the context of a case heard by the agency head with an explicitly defined Issue list, Post Hearing briefs and a Final Order to be prepared after considering staff recommendations on the enumerated legal, policy and factual issues. This agency is under no legal duty to

address each proposed conclusion in this setting. Therefore, we make no rulings on the 11 proposed Conclusions of Law submitted by ARK/NOAH IV.

We find that Commission rules do not require a "first-in-time, first-in-line" prioritization of standard offer contracts submitted to a utility. Rule 25-17.0832(d)3 does allow other methods of prioritizing contracts.

The pertinent portion of rule reads:

> "Within sixty days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions may be based on:
>
> 1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or
>
> 2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer." (emphasis added)

We believe that had the commission intended these two criteria to be exclusive, the words "may only" or "shall only" would appear in the place of the word "may". In reviewing the legislative history of the rule, we are unpersuaded that the Commission intended that these two explicit criteria were intended to be exclusive. The record is devoid of evidence suggesting the commission considered the possibility of an immediate over-subscription of a standard offer contract or of simultaneous delivery to the

utility or of a "first day queue" as experienced by Florida Power and Light Company and referenced in testimony in this proceeding. Moreover, the deletion of one proposed explicit basis for petitioning the Commission (a change in the utilities generation expansion plan) from the proposed rule should not be construed to eliminate every possible reasonable method of evaluating standard offer contracts. In the instant case, Florida Power Corporation acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by FPC to be the best available. We find that this action is consistent with the language of Rule 25-17.0832(3)(d), F.A.C.

We find that Florida Power Corporation did not violate its tariff by either petitioning for the Commission's authority to reject NOAH IV's standard offer contract on the basis of a comparative evaluation or by executing the standard offer contract delivered by FPC by Panda Kathleen on October 4, 1991.

Rule 25-17.0832 is incorporated by reference in FPC's standard offer tariff. The subject of "evaluation criteria" is not explicitly spoken to in the tariff. Any violation of the tariff is predicated on a violation of Rule 25-17.0832, F.A.C. Since we have determined that FPC's actions were consistent with the requirements of Rule 25-17.0832, F.A.C., no violation of FPC's tariff occurred.

Additionally, as recognized by Ark witness James Freeman, standard offer contracts are a unique type of tariff. Rather than selling products or services for an established price/rate, the standard offer tariff defines the terms of a utility purchase of products or services. We believe that standard offer contracts are published as tariffs as a matter of administrative convenience and are not subject to the same type scrutiny as a utility's offers to provide service. Therefore, we find that FPC did not violate its tariff by either petitioning for the Commission's authority to reject NOAH IV's standard offer contract on the basis of a comparative evaluation or by executing the

standard offer contract delivered to FPC by Panda Kathleen on October 4, 1991.

We find that ARK/NOAH IV did not waive its right to object to Florida Power's evaluation process by failing to notify Staff, other respondents to the standard offer or Florida Power of Ark/Noah's position that a first-in-time acceptance was required. Prior to the Petition to Reject Standard Offer Contracts filed by FPC, ARK/NOAH IV had no clear point of entry to a Section 120.57, Florida Statutes proceeding to exercise its rights. ARK/NOAH IV were under no duty to protest FPC's chosen procedure until they were afforded a point of entry by the Commission to do so.

Rule 25-17.0832, F.A.C., does not purport to give individual parties the right to object to the evaluation method utilized by a utility in evaluating standard offer contracts. Thus, ARK/NOAH could not waive a right that it never had in the first place. ARK/NOAH were under no duty to protest FPC's chosen procedure until they were afforded a point of entry to a proceeding pursuant to Section 120.57, Florida Statutes. In protesting the Notice of Proposed Agency Action entered in this docket ARK did what the law required.

We find that as of November 19, 1991, ARK/NOAH IV's Lake County Cogeneration Project was technically viable with respect to fuel transportation capability.

On June 20, 1991, a $10,000 reservation deposit was made to reserve pipeline capacity for the Ark/Noah project and other Ark projects on Florida Gas Transmission's Phase III expansion. Evidently, this fact was not communicated to FPC when Ark/Noah filed its standard offer acceptance or when asked for additional information by FPC. In addition, another pipeline is projected to be constructed in Florid that could provide gas transportation for the project. Sine the Ark/Noah project will have dual fuel capability, it could use another fuel as a

"bridge" measure between its in-service date and the availability of additional pipeline capacity. Therefore, we find that the Ark/Noah project appears to be technically viable with respect to fuel transportation capability.

We find that sufficient information was not provided to FPC to determine the technical viability of the proposed thermal host for ARK/NOAH IV's Lake County Cogeneration Project.

Ark/Noah's witness Malenius argues, in part, that viability with respect to the thermal host is assured based on the following: (1) there is sufficient lead time for a competent QF developer to construct such a project; (2) Ark Energy's financial strength and established experience; and (3) Ark is presently developing a similar facility (the Mulberry Facility). However, these facts, which are very general in nature, do not establish the viability of the thermal host for the *specific* project proposed by Ark/Noah in this proceeding.

On October 11, 1991, FPC sent a questionnaire to seven entities who had submitted standard offer contracts during the open season. This questionnaire, among other things, asked the proposer to describe the level of commitment from the steam user, including whether it is an existing, ongoing enterprise and whether the steam user has an ownership interest in the project. The questionnaire also asked for copies of commitments by the steam user on behalf of the project. In response to this specific request, Ark referred to Attachment "H" of its September 21 [sic], 1991, standard offer submittal to FPC. Attachment "H" of Ark's standard offer submittal has not been offered into evidence in this proceeding, but FPC assigned a score of minus 1 (Poor) to the category entitled "Host" in its comparative evaluation of the project.

In a letter to Thomas Wetherington of FPC, dated November 5, 1991, William Siderewicz of Ark Energy briefly discusses the possibility of marketing its CO2 product to a wholesaler, who, in turn, will distribute the

CO2 product to end users. Item 3 of that letter states, in part, "A copy of Carbonic Industries, 1990 annual report and recent communication regarding our working relationship is attached." We make the following three observations with regard to this information:

(1) the 1990 annual report of Carbonic Industries does not provide specific technical information to assess the viability of any specific thermal host;

(2) the one-page brief letter from David Fike of Carbonic Industries to William Siderewicz of Ark Energy provides almost no information on the purported "working relationship" between the two entities;

(3) the information provided does not constitute any kind of commitment to purchase the CO2 output.

Therefore, we find that sufficient information was not provided to FPC to establish technical viability of the proposed thermal host.

We find that as of November 19, 1991, ARK/NOAH IV's Lake County Cogeneration project did not have the highest likelihood of success relative to the other proposals received by Florida Power Corporation.

Although ARK/NOAH's witnesses testified that FPC's comparative evaluation system was unfair, no alternate weighting and ranking system was introduced into the record showing that the NOAH IV project would have the highest likelihood of success. The fairness and/or reasonableness of FPC's comparative evaluation procedure is not one of the issues that have been raised in this proceeding. However, we believe that the criteria used to evaluate the various proposals were valid, reasonable and fairly applied. Exhibit 1 contains the ranking criteria, ranking methodology, and the results of FPC's evaluation.

Based on our decisions in the above issues, the remainder of the issues raised in this proceeding are rendered moot.

In consideration of the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power Corporation's Petition for authority to reject all standard offer contracts except that submitted by Panda Kathleen, L.P. is GRANTED. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 22nd day of October, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(SEAL)

RVE

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Standard offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P. and Florida Power Corporation	Docket No. 950110-EI Order No. PSC-95-1590-FOF-EI Issued: December 27, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS AND MOTION TO STAY OR ABATE PROCEEDINGS

BY THE COMMISSION:

CASE BACKGROUND

On January 25, 1995, Florida Power Corporation (FPC) filed a petition with the Commission for a declaratory statement regarding certain aspects of its Standard Offer cogeneration contract with Panda-Kathleen, L.P./Panda Energy Company (Panda). Panda intervened in the proceeding and filed its own declaratory statement petition on the issues FPC had raised. Panda also raised an additional issue regarding postponement of the significant milestone dates of the standard offer pending the Commission's resolution of the declaratory statement proceedings. FPC moved to strike Panda's petition, which

we denied on the common issues both parties had raised in their petitions, but granted on the milestone date issue. See Order PSC-95-0692-FOF-EI, issued June 12, 1995.

On June 29, 1995, after a status conference with Commission staff, at which Panda expressed its concern that material factual issues were in dispute in the case, Panda filed a Petition for Formal Evidentiary Proceeding and Full Commission Hearing on the issues raised by the declaratory statement petitions. Panda contended that disputed issues of material fact affected all issues, and should properly be resolved before the full Commission in a formal administrative proceeding. Panda asserted that the standard offer is established by tariff and approved by the Commission, and to the extent permitted by applicable law the Commission has jurisdiction to make determinations respecting the contract and to grant the appropriate relief requested. We granted Panda's Petition in Order No. PSC-95-0998-FOF-EI, issued August 16, 1995.

Three days before Panda filed its petition for an evidentiary proceeding, Panda had filed a complaint in Federal antitrust court against FPC for violations of the antitrust laws. Panda requested a temporary and permanent injunction against FPC, prohibiting it from participating in this proceeding before the Commission. Panda alleged that the proceeding was a sham, because FPC knew that the Commission did not have jurisdiction to consider the issues regarding the standard offer contract. The Commission filed a Petition to Intervene in the federal case to inform the court of the nature and extent of its jurisdiction over standard offer contracts between public utilities and cogenerators. To protect the integrity of its regulatory process, and to protect its ability to fulfill its responsibility to implement and enforce PURPA (The Public Utility Regulatory Policy Act) in the State of Florida, the Commission also contested the allegation that its proceeding is a sham. Panda has since voluntarily dismissed its antitrust complaint against FPC.

On September 12, 1995, Panda filed a Motion to Dismiss and a Motion to Stay or Abate Proceedings in this case. Panda alleged that the Commission cannot consider the issues FPC has raised, because the Commission lacks jurisdiction over Panda, and it lacks jurisdiction over the subject matter of the case, the approved standard offer contract between Panda and FPC. As it did in its antitrust complaint, Panda alleged that this proceeding is a sham. FPC filed a Response in Opposition to Panda's motions on September 19, 1995. We heard oral argument on the motions September 25, 1995, and we decided at our December 5, 1995 Agenda Conference that the Motion to Dismiss and the Motion to Stay or Abate Proceedings should be denied. This Order memorializes that decision.

DECISION

Motion to Dismiss

The subject matter of this case is a "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less than 75 MW or a Solid Waste Facility". The form of standard offer, incorporated in FPC's filed tariff, was approved by the Commission in Order No. 24989, issued August 29, 1991. The specific standard offer at issue here was executed by Panda and FPC on November 25, 1991. It was specifically approved by the Commission in Order No. PSC-92-1202-FOF-EQ, issued October 22, 1992.

The standard offer states that the agreement is made "consistent with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date". The agreement provides that Panda will provide 74.9 MW (megawatts) of committed firm energy and capacity at rates based on FPC's avoided unit, a combustion turbine with a 1997 in-service date and a 20 year useful life. The term provision of the standard offer shows a term of thirty years, beginning in 1995 and ending in 2025. Firm capacity payments to be made to Panda, however, only last for 20 years, a period that corresponds to the life of the 1997 avoided unit.

FPC's Petition in this case alleges that in the summer of 1994, Panda informed FPC that it intended to build a cogeneration facility capable of producing 115 MWs of capacity to fulfil its 74.9 MW standard offer. Panda also raised questions about the 30-year term of the standard offer and the 20-year period of firm energy and capacity payments incorporated in Appendix C of the Standard Offer. FCP requests that we determine whether the proposed size of the plant complies with Commission Rule 25-17.0832(3)(a), Florida Administrative Code.[1] FPC also requests that we determine whether Rule 25-17.083 (3) (e) (6) requires FPC to make firm energy and capacity payments to Panda under the standard offer for 20 years or for 30 years.[2] In addition, Panda requests that we extend

---

Rule 25-17.0832(3)(a) states;

(3) Standard Offer Contracts

(a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091.

2 Rule 25-17.0832 (3) (e) provides, in pertinent part that;

(e) Minimum Specifications. Each standard offer contract shall, at a minimum, specify . . .

6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided

(continued . . .)

the milestone dates of the standard offer to reflect the regulatory delays caused by this proceeding.

Panda asserts in its Motion to Dismiss that we do not have jurisdiction to hear this case because we have no jurisdiction over Panda itself, and because we are preempted by Federal law from "'revisiting' the previously-approved contract". Panda claims that we cannot resolve any contract dispute between utilities and cogenerators. Referring to the our recent orders deferring to the courts to interpret negotiated cogeneration contract provisions and resolve negotiated cogeneration contract disputes, Panda claims that there is no valid difference between our authority over negotiated contracts and our authority over standard offer tariff contracts. Panda states that our rule limiting the availability of standard offer contracts to small cogenerators under 75 MW has no basis in federal law. Panda claims that this proceeding will subject it to "utility-type regulation" from which it is exempt under PURPA and FERC's (Federal Energy Regulatory Commission) regulations implementing PURPA.

FPC responds that whether or not we have jurisdiction over a cogenerator, we clearly have jurisdiction over a public utility itself and the standard offer cogeneration contracts that we require the utility to execute. FPC also states that Panda has voluntarily submitted to our jurisdiction and affirmatively requested relief on the same issues FPC has raised. FPC contends that Panda's arguments and supporting case law are not relevant to the issues FPC has raised and the relief FPC has requested. FPC asserts that we clearly have jurisdiction to interpret our own standard offer rules as they apply to this agreement. FPC points out that Panda does not mention the numerous cases in which we have exercised our jurisdiction

---

(. . . continued)

unit, commencing with the anticipated in-service date of the avoided unit . . . .

to interpret standard offers and the rules govern them.[3] FPC argues that neither PURPA, nor FERC's rules implementing PURPA, preempt the Commission's authority to answer the questions raised in this case. According to FPC, PURPA and FERC's guidelines establish a cooperative regulatory scheme in which the federal government has prescribed broad guidelines to encourage the development of cogeneration, and the states retain continuing responsibility to implement and enforce those guidelines. As long as the state regulatory agency acts in ways that are compatible with the FERC guidelines, it is carrying out its intended role under PURPA.

Jurisdiction over Panda

Panda's argument that the Commission should dismiss this case because it does not have jurisdiction over Panda is groundless for two reasons. First, we have extensive regulatory authority over FPC, the public utility required to purchase cogenerated power under the state-created and state-controlled standard offer contract. Second, Panda has voluntarily submitted itself to our jurisdiction by taking substantive action in the case and requesting affirmative relief from us. A claim of lack of

---

[3] See, for example, *In re: CFR Bio-Gen's Petition for Declaratory Statement Regarding the Methodology to be used in its Standard Offer Cogeneration Contracts with Florida Power Corporation*, Order No. 24338, issued April 9, 1991, Docket No. 900877-EI; *In re: Complaint by CFR Bio-Gen against Florida Power Corporation for alleged violation of standard offer contract, and request for determination of substantial interest*, Order No. 24729, issued July 1, 1991, Docket No. 900383-EQ; *In re: Petition of Timber Energy Resources, Inc. for a declaratory statement regarding upward modification of committed capacity amount by cogenerators*, Order No. 21585, issued July 19, 1989, Docket No. 8890453-EQ; *In re: Petition for Declaratory Statement by Wheelabrator North Broward, Inc.*, Order No. 23110, issued June 25, 1990, Docket No. 900277-EQ.

jurisdiction over the subject matter of a case (in rem jurisdiction) may be raised at any time, even for the first time on appeal; but a claim of lack of jurisdiction over the person (in personam jurisdiction) must be affirmatively asserted before the party takes any substantive action in the case or the claim will be deemed waived. *Miller v. Marriner,* 403 So. 2d 472 (Fla. 5th DCA 1981); *Alsup v. Your Graphics are Showing, Inc.,* 551 So. 2d 222 (Fla. 2d DCA 1988); *Hubbard v. Cazares,* 413 So. 2d 1192 (Fla. 2d DCA 1981). Panda's own Petition for Declaratory Statement and its Petition for Formal Evidentiary Proceeding preclude it from arguing lack of jurisdiction over Panda now.

Jurisdiction over the Subject Matter

Panda's motion to dismiss generally raises a broad array of state and federal issues concerning the relationship between public electric utilities and cogenerators and the shared jurisdiction of state and federal regulators over that relationship. Panda's broad, general arguments, however, never really address the issues in this case, the facts in this case, or the specific relief that FPC has requested.

We note that in 1978, Congress enacted PURPA to develop ways to lessen the country's dependence on foreign oil and natural gas and to encourage the use of waste energy. PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities. Section 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). Section 210(b) directs FERC to set rates for the purchase of power from QFs that are just and reasonable to the utility's ratepayers and in the public interest, not discriminatory against QFs, and not in excess of the incremental cost to the utility of alternative electric energy. Section 210(e) directs FERC to adopt rules exempting QFs from state and federal regulation

of electric utility rates and financial organization, *except* those regulations established to implement and enforce PURPA's mandate. Section 210 (e) (3) specifically states that qualifying facilities will not be exempt from regulations implementing PURPA. Section 210 (f) directs state regulatory authorities to implement PURPA and FERC's rules.

FERC's regulations implementing PURPA require utilities to purchase QF power at the price equal to the utility's full avoided cost, "the incremental costs to the electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source". 18 C.F.R. s. 292.101 (b) (6). In subpart C of its regulations FERC directs the states and their utility commissions to implement, on a continuing basis, FERC's regulations. Subpart F reflects PURPA's intent to exempt qualifying facilities from traditional state utility regulation, with the exception of state regulation implementing PURPA. 18 C.F.R. s. 292 (c) states:

> (c) Exemption from certain State law and regulation.
>
> (1) Any qualifying facility shall be exempted (except as provided in paragraph (c) (2) of this section) from State law or regulation respecting:
>
> (i) The rates of electric utilities; and
>
> (ii) The financial and organizational regulation of electric utilities.
>
> (2) A qualifying facility may not be exempted from State laws and regulation implementing Subpart C.

In compliance with PURPA, Section 366.051, Florida Statutes, provides that Florida's electric utilities

must purchase electricity offered for sale by QFs, "in accordance with applicable law". The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy.

Our implementation of PURPA, FERC's regulations, and Section 366.051, Florida Statutes is codified in Rules 25-17.080-25-17.091, Florida Administrative Code, "Utilities Obligations with Regard to Cogenerators and Small Power Producers". The rules generally reflect FERC's guidelines in their purpose and scope. They provide two ways for a utility to purchase QF energy and capacity: by means of a standard offer contract; or an individually negotiated power purchase contract. See Rules 25-17.081(1) and 25-17.0832, Florida Administrative Code.

The Commission's rules require utilities to publish a standard offer contract in their tariffs which the Commission must approve and which must conform to extensive guidelines regarding, for example, determination of avoided units, pricing, cost-effectiveness for cost recovery, avoided energy payments, interconnection, insurance, the term of the contract, and the length of the capacity payment stream. Utilities must purchase firm energy and capacity and as-available energy under standard offer contracts if a QF signs the contract. A utility may not refuse to accept a standard offer contract unless it petitions the Commission and provides justification for the refusal. See Rule 25-17.0832 (3)(d), Florida Administrative Code.

The same is not true for negotiated contracts, and the distinction is significant. Rule 25-17.082(2), Florida Administrative Code, encourages utilities and QFs to negotiate contracts, and provides the criteria we will consider when we determine whether a contract is prudent for cost recovery purposes. Rule 25-17.0834, "Settlement of Disputes in Contract Negotiations", imposes an obligation to negotiate cogeneration contracts in good faith,

and provides that either party to negotiations may apply to the Commission for relief if the parties cannot agree on the rates, terms and other conditions of the contract. Utilities are not required to execute a negotiated contract, and they are not required to include the vast array of specific provision that the standard offer rules contain. As we observed in Order No. PSC-95-0210-FOF-EQ, issued February 15, 1995, negotiated contracts are not subject to such extensive direction and control under the rules.

> While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts. We have interpreted the provisions of standard offer contracts on several occasions, but we have not interpreted the provisions of negotiated contracts.

Order at p. 7.

There is a valid regulatory purpose behind the different treatment of negotiated contracts and standard offers in our cogeneration rules, and it is entirely consistent with federal regulation. State-controlled standard offers that a utility is required to execute encourage the development of cogeneration by relieving small qualifying facilities from the burden of negotiating with utilities that have greater resources and superior bargaining power. Conversely, because a utility is not free to negotiate the terms and conditions of a standard offer, it is entitled to rely upon the stability and certainty of the standardized terms established and enforced by the Commission's rules, just as the cogenerator is.

In this case FPC has asked us to apply and enforce the cogeneration rules we developed to implement PURPA. As we stated in *Re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserve Cogeneration Agreement,* Docket No. 840438-EI, Order No. 14207, issued March 31, 1985: "[T]he Commission certainly has jurisdiction to construe its own Rules at the

request of a regulated utility to which those rules apply." If we did not have that authority there would be no reason to have implemented the rules. Contrary to Panda's claims, it does not appear to us that FPC is asking us to "revisit" and modify or terminate Panda's standard offer. Rather, FPC is asking us to apply our rules, in effect at the time the standard offer was executed and approved, to the terms of the contract we approved. In fact, it appears to us that Panda is the party suggesting that the standard offer be modified.

The relief FPC has requested here does not conflict with federal regulations or subject Panda to "utility-type" state rate regulation. It seeks an answer to two questions: 1) Under the provisions of Rule 25-17.0832 (3) (a), Florida Administrative Code, as applied to the standard offer at issue, is Panda permitted to build a cogeneration facility larger than 75 MW; 2) Under the provisions of Rule 25-17.0832 (3) (e) (6), Florida Administrative Code, as applied to the standard offer at issue, is Florida Power obligated to make firm capacity and energy payments to Panda for more than 20 years. Certainly we have the authority to answer those questions.

To prevail on its motion to dismiss Panda must demonstrate that the facts alleged in FPC's petition, when viewed in the light most favorable to FPC, fail to set forth any claim that the Commission can resolve. We find that the motion has not met this test. We deny the Motion to Dismiss.

Motion to Stay or Abate Proceedings

Panda's Motion to Stay or Abate Proceedings, in its entirety, consists of the following paragraph;

> When the jurisdiction of a court or agency is put at issue - which can be done by the parties or the court or agency at any time- then the court or agency should not take any further actions until reply briefs are filed and

> a proper determination of jurisdiction is made. All decisions and actions of a court or agency without jurisdiction are void and may be ignored. See *Stel-Den of America, Inc. v. Roof Structures, Inc.*, 438 So. 2d 882 (Fla. App. 1983).

The authority cited above supports the position that a claim of lack of subject matter jurisdiction can be raised for the first time on appeal or at any other time. The authority does not support the position that a court or agency must refrain from taking any action every time a litigant raises a subject matter jurisdiction argument. The wheels of justice would grind quickly to a halt if parties could so easily delay a proceeding by that tactic. Nor does the *Stel-Den* case state that decisions of a court or agency without jurisdiction may be summarily ignored.

Rule 25-22.061(2), Florida Administrative Code, provides that a decision to grant a stay rests within the sound discretion of the Commission. Usually a stay is requested under this rule after judicial review of the Commission's final or non-final order has been requested. Without commenting on the merits of such a motion now, we believe that this motion is premature and would be better filed if Panda seeks judicial review of our decision to deny its motion to dismiss. Therefore, we deny the motion to stay or abate proceedings without prejudice to file another motion to stay, pending judicial review of our decision.

It is therefore

ORDERED by the Florida Public Service Commission that the Motion to Dismiss and the Motion to Stay or Abate Proceedings filed by Panda-Kathleen, L.P. are denied. It is further

ORDERED that this docket shall remain open until the substantive issues of the case are resolved.

By ORDER of the Florida Public Service Commission, this 27th day of December, 1995.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay Flynn
Chief, Bureau of Records

(SEAL)

MCB

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Standard offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P. and Florida Power Corporation.	Docket No. 950110-EI Order No. PSC-96-0671-FOF-EI Issued: May 20, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

FINAL ORDER
CLARIFYING STANDARD OFFER CONTRACT

BY THE COMMISSION:

CASE BACKGROUND

On January 25, 1995, Florida Power Corporation (FPC) filed a petition with the Commission for a declaratory statement regarding certain aspects of its Standard Offer cogeneration contract with Panda-Kathleen, L.P./Panda Energy Company (Panda). Panda intervened in the proceeding and filed its own petition for a declaratory statement on the issues raised by FPC. Panda raised an additional issue regarding postponement of the significant milestone dates of the standard offer contract pending resolution of the declaratory statement proceedings. Panda then filed a Petition for Formal Evidentiary Proceeding and

Full Commission Hearing on the issues raised by the declaratory statement petitions. We granted this Petition in Order No. PSC-95-0998-FIF-EI, issued August 16, 1995, and set the case for hearing, which was held on February 19, 1996.

The parties filed post-hearing statements and briefs on March 29, 1996. Panda also field 90 proposed findings of fact. We include our ruling on each proposed finding in Attachment A to this Order. Our decision on the issues addressed at the hearing is set forth below.

DECISION

The parties presented three main issues for our consideration: 1) Whether Panda's proposed 115 MW (megawatt) qualifying facility complies with Rule 25-17.0832, Florida Administrative Code and the standard offer contract with Florida Power Corporation; 2) Whether Rule 25-17.0832 (3) (e) (6), Florida Administrative Code and the standard offer contract require Florida Power Corporation to make firm capacity payments for the life of the avoided unit (20 years) or the term of the standard offer contract (30 years); 3) Whether, and for how long, the Commission should grant Panda's request to extend the milestone dates in its standard offer contract.

1) The size of the proposed facility

FPC asserts that Rule 25-17.0832 (3) (a), Florida Administrative Code, and the Panda standard offer contract that expressly incorporates the rule, limit the availability of standard offer contracts to "small cogeneration facilities less than 75 MW." FPC claims that the 75 MW limitation in the rule applies to the net capacity of the facility to be built. FPC disputes Panda's argument that the 75 MW limit applies to the contract's Committed Capacity, not to the ultimate size of the generating unit. FPC argues that Panda's position is contrary to the rule's plain language and prior Commission decisions.

Panda claims that its proposed 115 MW plant is in compliance with the standard offer contract, as supported by the language of the contract and the parties' actions. Panda argues that compliance with Rule 25-17.0832 (3) (a), Florida Administrative Code, is not relevant to our decision on this issue; but nevertheless, the proposed facility does comply with the rule.

Rule 25-17.0832, contains our rules governing standard offer contracts. The rule was specifically amended October, 1990, to ensure that standard offer contracts were reserved for small qualifying facilities. Subsection (3) (a) states, in part, that:

> . . . each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities *less than 75 megawatts* . . . (emphasis added)

Subsection (3) (c) of the rule states:

> In lieu of a separately negotiated contract, a qualifying facility *under 75 megawatts* or a solid waste facility, as defined in Rule 25-

> 17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to Subsection (2). (emphasis added)

We determined in Docket No. 920556-EQ, *In Re: Petition for Declaratory Statement Regarding Sale of Additional Capacity From a Qualifying Facility via a Standard Offer Contract, by Polk Power Partners, L.P., LTD.*, Order No. PSC-92-0683-DS-EQ, that the 75 MW threshold described in Rule 25-17.0832 (3) (a) applies to the "total net capacity" of a qualifying facility, rather than the "committed capacity" sold by a qualifying facility pursuant to a standard offer contract. Net capacity is defined as generator output available for sale after subtracting internal load and interconnection losses. Although our declaratory statement in Polk Power Partners was limited to the specific facts and circumstances of that case, that decision is informative with respect to our intent in Rule 25-17.0832, Florida Administrative Code, to preserve standard offer contracts for small qualifying facilities of 75 MWs or less.

Citing climate conditions, performance degradations, and revised emission standards in Florida, Panda witness Killian asserted that a unit with a net capacity of 115 MW was needed to ensure Panda's compliance with the 74.9 MW firm capacity contract. Mr. Killian also argued that the Commission's rules refer to committed capacity rather than facility size. Mr. Killian stated that the "standard offer contract does not limit the size of the facility." We believe this testimony conflicts with the straightforward language of Rule 25-17.0832, Florida Administrative Code. If any ambiguity surrounding the intent of the rule to reserve standard offer contracts for small qualifying facilities existed, that ambiguity was eliminated when we issued the declaratory statement in Polk Power Partners. While there is no specific language in the standard offer contract that limits the size of the facility to

75 MWs or less, the standard offer that Panda and FPC executed expressly incorporates our rules in Appendix E.

Panda witness Dietz also testified that Panda must build a 115 MW plant to fulfill its obligations under the 74.9 MW standard offer contract. Mr. Dietz asserted that Panda was required to make 74.9 MW of capacity available under all conditions and at all times. We disagree. The standard offer contract does not require that Panda supply 74.9 MW at all times. The contract specifies an on-peak capacity factor of 90% and an overall capacity factor of 42%. FPC witness Dolan testified that Panda's standard offer contract could be served by a facility with a net rated capacity of 75 MW. He mentioned other qualifying facilities that have capacity contracts with FPC, such as Tiger Bay, Orlando Cogen, and Mission Energy, that consistently provide capacity at their net rated output.

We believe it is reasonable to assume that, on occasion, Panda's proposed facility may generate slightly above 75 MW. Generating units are typically manufactured in block sizes, and it may not even be feasible to install a generating facility with a net capacity of exactly 74.9 MW, without occasionally exceeding 75 MW. Nevertheless, the evidence shows that Panda could adequately serve its contract with a facility much smaller than 115 MW. The evidence also shows that Panda itself did not believe it needed additional capacity to serve its standard offer contract, because if offered to sell an additional 35 MW of firm capacity from the facility to the City of Lakeland.

Panda relies on an August 24, 1994, letter from the Director of the Commission's Division of Electric and Gas to Panda's former counsel, Mr. Barrett Johnson, to support its position that it could build a 115 MW plant to serve a 74.9MW standard offer. In his letter, Mr. Jenkins stated, in part, that:

> Based on the representations, I foresee no reason why this is any type of contract

> change that should come before the Commission for approval.

That letter did not, however, address whether the size of Panda's proposed facility would comply with Rule 25-17.0832, Florida Administrative code, which is at issue here.

In light of the evidence in the record, we find that Panda does not need a 115 MW facility to serve its standard offer contract. Even if Panda needed to build a larger facility, our rules do not allow it. Therefore, we hold that Panda's proposed qualifying facility does not comply with Rule 25-17.0832, Florida Administrative Code.

2) The term of capacity payments

FPC argues that Rule 25-17.0832 (3) (e) (6), Florida Administrative Code, and the Panda standard offer contract, limit the delivery of firm capacity under a standard offer contract to a maximum period that is equal to the life of the avoided unit. The Panda standard offer contract defines that period as 20 years. Panda argues that it is entitled to firm capacity payments for the full term of the contract, as supported by the language of the contract and the parties' actions. Panda asserts that, although it believes compliance with the rule is not relevant to this case, payments made according to the full contract term of 30 years would, nevertheless, be in compliance with Rule 25-17.0832.

The standard offer contract and Rule 25-17.0832 (3) (e) (6), Florida Administrative Code, are not consistent with respect to the term for firm capacity payments. The standard offer contract has a contract termination date of March, 2025, 30 years from the early in-service date originally requested by Panda. The *Capacity Commitment* section of the contract states:

> The committed capacity shall be made available at the Point of Delivery from the Contract In-Service Date through the remaining Term of this Agreement.

Rule 25-17.0832 (3) (e) (6), Florida Administrative Code, establishes the period of time during which firm capacity and energy can be delivered under a standard offer contract. The rule states, in pertinent part, that:

> At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit . . .

As we mentioned above, our rules governing cogeneration contracts are included in Appendix E to the standard offer. Appendix C, Schedule 2 to the standard offer contains the operating and economic parameters pertaining to FPC's avoided unit, a 1997 combustion turbine. This schedule clearly shows that the economic plant life of FPC's avoided unit is 20 years.

Since the contract term is 30 years, but the economic life of the avoided unit is 20 years, FPC witness Dolan testified that the contract only requires FPC to purchase as-available energy starting in year 21. While we agree that Mr. Dolan's assumption is logical, we need to point out that his assertion is not supported by specific language to that effect in the standard offer contract.

Panda witness Shanker testified that FPC's avoided unit is essentially the first in a stream of avoided units, and, therefore, the value of deferral methodology does not limit the term of capacity payments. Mr. Shanker assumes that subsequent avoided units will be the same type as FPC's original one, with similar costs. Although Mr. Shanker is technically correct according to the value of deferral methodology, his assumption would inappropriately tie FPC to a planning decision for a second avoided unit 20 years ahead of time. Rule 25-17.0832 (3) (e) (6), Florida Administrative Code, was adopted to avoid just this situation. The rule clearly states that the economic plant life controls the term of capacity payments. If we were to determine that FPC must make firm capacity payments to Panda for 30 years in the manner suggested by Mr. Shanker, FPC's capacity payments would exceed the

avoided costs of the unit identified in the standard offer. This is clearly in violation of both the Public Utility Regulatory Policy Act (PURPA) and our rules for QFs, which were implemented to ensure that utilities pay no more than the avoided cost to purchase capacity and energy from qualifying facilities.

Panda also alleges that discussions were held with FPC, and a verbal agreement was reached, to extend the term of firm capacity payments to 30 years. Panda and FPC disagree on the content of those discussions. Whether such an agreement was reached is, however, immaterial to the determination of the payment period. Rule 25-17.0832, Florida Administrative Code, cannot be violated by extending the firm capacity payment term. "Implied in every contract is the fact that it is to be interpreted and enforced in accordance with the law." *de Slatopolsky v. Balmoral Condominium Association,* 427 So. 2d 781 (Fla. 3d DCA 1983). Since our rules have the force and effect of law (See *Hulmes v. Division of Retirement, Department of Administration,* 418 So. 2d 269 (Fla. 1st DCA 1982), any ambiguity in Panda's standard offer contract must be resolved in conformance with the rules that govern it. Therefore, we hold that FPC will only be responsible for firm capacity payments to Panda, and eligible for cost recovery of those payments, for 20 years, in compliance with Rule 25-17.0832, Florida Administrative Code.

Principles of fairness deter us from requiring FPC to make 30 years of capacity payments under the contract, while allowing only 20 years of cost recovery under the rule. It would be equally unfair to require FPC to make only 20 years of capacity payments, but commit Panda to compliance with its contractual performance requirements for 30 years. Therefore, FPC shall only be required to make capacity payments for 20 years, in accordance with our rules, and Panda will only be responsible for supplying firm capacity for 20 years. The total capacity payment stream must have a net present value of approximately $71 million in 1996. This net present value equals that of the payment stream contained in Appendix C, Schedule 3 of the

standard offer contract. This approach is the best way to resolve the inconsistency between the contract language and the rule.

Milestone Dates

FPC argues that the milestone dates in the standard offer contract should not extended. FPC asserts that Panda failed to carry its burden of proof that FPC was the sole reason Panda failed to meet its milestones. FPC argues that it has already presented uncontroverted testimony that Panda's failure to obtain financing and thereby meet its milestones was a direct result of Panda's own actions. Panda argues that the milestone dates should be extended because FPC's actions in initiating this proceeding effectively precluded Panda from further development of its project.

FPC initiated this proceeding to resolve disagreement over fundamental aspects of its standard offer contract with Panda; the term of firm capacity payments and the unit size of the qualifying facility. FPC filed its petition on January 25, 1995, nearly fifteen months ago. While it is true that Panda has contributed to the delay in resolving the issues in this case, FPC witness Morrison testified that uncertainty among lending institutions contributed to delays in acquiring financing for Panda's project. Potential financiers questioned whether FPC would be required to purchase capacity in excess of 74.9 MW, and whether FPC would have to make firm capacity payments for more than 20 years. Mr. Morrison admitted that lenders would want the uncertainty in this docket resolved prior to closing on any financing arrangements. Thus, Panda had to delay proceeding with project financing pending our decision in this docket. No party should be penalized because of the time required to resolve this case. The milestone dates in Panda's standard offer contract shall, therefore, be extended.

Panda argues that it needs 36 months to finance, order equipment, and build the facility. FPC states that

milestone dates should be extended by no more than one year, since FPC filed its declaratory statement petition in this docket approximately one year prior to the start date for facility construction.

Panda witness Killian testified that Panda would need a total of at least 18 months to gain financing and order equipment, and an additional 18 months to construct the unit. Mr. Killian admitted under cross-examination, however, that Panda's time line was not "set in stone", and could be shortened. FPC witness Morrison disagreed with Mr. Killian's time line to arrange financing for the project. Mr. Morrison stated that Panda should be able to acquire financing "anywhere from 90 to 120 days, with 180 days at the outside."

We believe that a party should neither be helped nor harmed because of the time requirements of the regulatory process. We hold, therefore, that it is appropriate to extend the contractual milestone dates by a period equal to the time necessary for deciding the matters in this docket. An extension of 18 months represents the approximate amount of time that has transpired from the filing date of FPC's petition for a declaratory statement until the effective date of our order in this docket. Thus, we will extend the milestone dates for Panda's standard offer contract to January 1, 1997, for construction commencement, and July 1, 1998, for the in-service date.

Capacity and Energy Payments

As previously discussed, Panda should receive a 20-year capacity payment stream. That payment must have a net present value of approximately $71 million in 1996. This net present value equals that of the payment stream contained in Appendix C, Schedule 3 of the standard offer contract. Since all energy payments must be made according to Rule 25-17.0832(4), Florida Administrative Code, we direct FPC to file a new capacity payment stream for administrative approval within 30 days of the date this Order is issued.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Panda Energy Company's proposed qualifying facility must have a net generating capacity of 75 MWs or less in order to comply with Rule 25-17.0832 (3) (a), Florida Administrative Code. It is further

ORDERED that Florida Power Corporation must make firm capacity payments to Panda Energy Company under the standard offer contract for the life of the avoided unit, which is 20 years. It is further

ORDERED that the payment stream must have a net present value equal to the capacity payment stream set forth in "Appendix C" to the standard offer contract between Florida Power Corporation and Panda Energy Company. It is further

ORDERED that the milestone dates contained in the standard offer contract shall be extended for a period of 18 months. It is further

ORDERED that Florida Power Corporation must file a new capacity payment schedule for administrative approval within 30 days of the issuance of this Order. It is further

ORDERED that specific rulings on Panda's proposed findings of fact are included at Attachment A to this Order and incorporated herein. It is further

ORDERED that this docket shall be closed.

ORDER NO. PSC-95-1590-FOF-EI
DOCKET NO. 950110-EI

By ORDER of the Florida Public Service Commission, this 20th day of May, 1996.

Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

MCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

ATTACHMENT A

PROPOSED FINDINGS OF FACT — PANDA-KATHLEEN, L.P.

Pursuant to Rule 25-22.056(2), Florida Administrative Code, Proposed Findings of Fact shall be succinct, shall clearly cite to the record, and shall not contain mixed questions of law and fact. We have reviewed Panda Energy Company's Proposed Findings of Fact and rule on them as follows:

1. In early 1991, Florida Power sought to purchase power from cogenerators by utilizing the standard offer methodology established by the Commission. To that end, Florida Power submitted for Commission approval a standard offer contract form. (Ex. 5).

   RULING: Accept.

2. A standard offer contract sets, in advance, the rates and terms for which the utility will purchase electricity from a QF Under the Commission's Rule, that rate must represent the "full avoided cost"; in other words, the utility must offer to pay a rate equivalent to the full amount of money saved by the utility by not having to build its own new generating facility. Rule 25-17.0832(3).

   RULING: Reject as an argument rather than a finding of fact. The statement is an incorrect argument of full avoided cost.

3. In addition to the use of standard offer contracts, the Commission's regulations authorize utilities to directly enter into negotiations with QFs for the purchase of power. Rule 25-17.0832(2). Those regulations require the utility to engage in

negotiations with QFs, and to do so in good faith. *Id.*

RULING: Accept.

4. Under the "negotiated contract" rule, the rate paid to the QF can be no more than the full avoided cost, but may be less. Any contract resulting from such negotiations must be reviewed and approved by the Commission. *Id.*

RULING: Accept with the clarification that we review and approve negotiated contracts solely for cost recovery purposes.

5. When approving a standard offer contract or a negotiated contract with a QF, the Commission approves the contract as being in compliance with the Public Utilities Regulatory Practices Act ("PURPA"), as implemented by the Commission's Rules. The Commission approves such contracts as to the calculation of the avoided cost rate, and the necessity of avoiding the designated avoided unit. (T. 79, C.1-25 (Dolan).

RULING: Accept the first sentence of the proposed finding. Reject the second sentence as unclear *and* unsupported by the record citation.

6. The only substantive difference between standard offer contracts and negotiated contracts is that the former are approved by the Commission prior to execution and the latter are approved by the Commission after execution.

RULING: Reject as an argument rather than a finding of fact *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

7. The 1991 standard offer contract in this case is substantially similar to the negotiated contracts that Florida Power executed with numerous QFs in 1991. (T.82, L. 12-19 (Dolan)); (T. 229, L. 5 - T. 230, L. 11) (Killian); (Ex. 23). When entering into negotiated contracts in 1991 with a series of QFs, Florida Power required the QFs to use a standard form of contract. (T. 76, L. 19-23 (Dolan)). Florida Power based its standard offer contract form on the negotiated contract form it had been using. (T. 81, L. 19 - 82, L. 7 (Dolan)); (Ex. 23, RK-4); (T. 230, L. 6-11 (Killian)).

RULING: Reject the first sentence of the proposed finding as unsupported by the greater weight of the evidence *and* unsupported by the record citation. Reject the second and third sentences as irrelevant to decide the factual matters at issue in this case. Issues in this case pertain to the standard offer contract, not the negotiated contract.

8. The standard offer contract form for which Florida Power sought approval from the Commission contained several blanks which could be completed by prospective QFs, including the two contract terms which are the subject of this dispute: 1) the amount of power that the QF would be obligated to provide to the utility as "Committed Capacity," and 2) the duration of the QFs obligation to provide power (and Florida Power's obligation to make payments) under the contract. See Ex. 30 at ¶¶ 4.1, 7.1.

RULING: Reject as unsupported by the evidence. The second contract term referred to above does not relate to FPC's obligation to make payments but, rather, the termination date of the contract.

9. In August 1991, the Commission reviewed and approved Florida Power's form of standard offer contract and rate tariff (as well as standard offer contracts submitted by other electric utilities). (Ex. 7). In rendering its approval of that form, the Commission specifically held that a "regulatory out" clause should not be included in the standard offer contract submitted by Florida Power. See Ex. 7 at pp. 70-71. This clause, which had previously been authorized by the Commission in the negotiated QF/utility contracts, would have allowed the Commission to alter the terms of the contract or the rates that the utility would have to pay based upon changed circumstances.

RULING: Accept the first and second sentences of the proposed finding. Reject the third sentence because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

10. Following the Commission's approval of the standard offer contract form, Florida Power sent copies of the standard offer contract to interested QFs, and declared a two-week "open season" for any QF to execute and return the contract. (Ex. 7 at p.1). By the close of that period, Florida Power had received ten executed standard offer contracts, including one from Panda. (Ex. 8).

RULING: Accept.

11. After receiving multiple standard offer contracts, Florida Power distributed a questionnaire to each interested QF, requesting information regarding the proposed facility that the QF would construct. Panda's response to that questionnaire included a proposed tentative plant design that would generate in excess of 75 megawatts of net generating capacity. (T. 106, L. 5-9 (Dolan)); (T. 283, L. 11-19 (Killian)).

RULING: Accept the first sentence of the proposed finding. Accept the second sentence with the clarification that the plant configuration originally proposed by Panda would "occasionally produce over 75" MW of net capacity (Tr. 106, line 7).

12. Under the Commission's regulations, a standard offer contract signed and submitted by a qualifying facility must be accepted by Florida Power unless Florida Power affirmatively seeks permission of the Commission to reject the contract. Rule 25-17-0832(3)(b).

RULING: Accept.

13. In executing the standard offer contract, Panda filled in the blanks with a "Committed Capacity" of 74,900 kilowatts (equal to 74.9 megawatts), Ex. 30 at ¶ 7.1, and a contract term of 30 years. Ex. 30 at ¶ 4.1.

RULING: Accept with the clarification that Panda did *not* fill in a blank containing a contract term of 30 years; rather, Panda filled in a blank which contained the termination date of the contract. The date which Panda provided was 30 years after the early in-service date originally agreed to by Panda and FPC

14. The contract with Panda provides that "the term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of march 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement." Ex. 30 at ¶ 4.1.

RULING: Accept.

15. Pursuant to the contract with Panda, "the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement". Ex. 30 at 7.1; (T. 171, L. 9-14 (Dolan)).

RULING: Accept with the clarification that this transcript cite does not contain this statement as originating from FPC Witness Dolan. He simply agreed that this statement is contained in the contract.

16. The Panda contract provides that Florida Power "agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement. Ex. 30 at ¶ 6.1.

RULING: Accept.

17. The Panda contract provides that Florida Power, throughout the life of the contract, has the right to require Panda to demonstrate at any time that it is, in fact, providing 74.9 MW "*or more*" at the delivery point defined therein. Ex. 30, ¶¶ 7.4, 1.8.

RULING: Reject as misleading *and* unsupported by the weight of the evidence. The cited exhibit states that demonstration of the facility's commercial in-service status shall be required "not more than once in any 12 month period", and such demonstration "avoids, if practical, previously notified periods of planned outages . . ."

18. The Panda contract provides for payment to Panda under two separate mechanisms. First, Panda is paid a "capacity payment" for the amount of "Committed Capacity" that Panda offered to provide, in this case 74.9 MW. Ex. 30 at ¶¶ 8.2-8.5. Committed Capacity is defined in the contract as the amount of electricity that Panda is obligated

to provide to Florida Power's transmission grid at all times, under all environmental conditions. *Id.*

RULING: Accept the first sentence of the proposed finding. Accept the second sentence with the clarification that Panda not only "offered", but committed by contract to provide 74.9 MW. Reject the third sentence as unsupported by the greater weight of the evidence. The contract does not required Panda to provide committed capacity "at all times, under all environmental conditions". Rather, the contract specifies an on-peak capacity factor of 90% and an overall capacity factor of 42% (Exhibit 30, Appendix C, Schedule 2).

19. In addition to capacity payments, Panda is to be paid for *all* of the actual electrical energy that the Panda plant provides to Florida Power, under certain alternate rate schemes. Ex. 30 at ¶¶ 9.1-9.2. No capacity payment is to be made for energy in excess of 74.9 megawatts. *See* Ex. 30 at ¶¶ 8.2-8.5.

RULING: Reject as unclear. It is not clear what is meant by "certain alternate rate schemes."

20. The committed power supply that would have been provided by the ten executed contracts received by Florida Power at the close of the open season was well in excess of the amount that Florida Power was seeking. (T. 92, L. 14-18 (Dolan)). As a result, Florida Power began a process of choosing which standard offer contract (or contracts) it wanted to utilize.

RULING: Accept.

21. Florida Power prepared a report rating the standard offer contracts it received, and filed that report with the Commission. (Ex. 8). The report specifically described the Panda contract proposal as having a

thirty year term, and a Committed Capacity of 74.9 MW. (Ex. 8 at pp. 1, 2, 15, 19)

RULING: Accept.

22. Florida Power ranked Panda's contract submission as the best in terms of feasibility and benefit to ratepayers. *Id.* Based on that report, Florida Power petitioned the Commission for permission to reject all of the standard offer contracts it had received except the one received from Panda. *Id.*

RULING: Accept.

23. During the open season, several standard offer proposals were submitted to Florida Power by QFs which also contained contract terms of thirty years and/or facilities with net generating capacities larger than 74.9 megawatts. (Ex. 8 at pp. 13; 15); (T. 558, L. 1-14 (Dietz)); (T. 98-99 (Dolan)). For example, Sparrow submitted a proposal with 85 megawatts of net generating capacity, and Noah and Destec submitted proposals for a thirty year term. *Id.* Florida Power did not reject any of the QF proposals on that basis, nor did it suggest to the Commission that any of those proposals would violate the Commission's Rules. (T. 98, L. 23 - 99, L. 4 (Dolan))

RULING: Accept the first sentence of the proposed finding. Reject the second sentence because the transcript cites do not support this statement. Reject the third sentence as irrelevant to decide the factual matters at issue in this case.

24. In the 1991 standard offer open season, Florida Power received a contract from Sparrow in which Sparrow had selected a committed capacity of 75 megawatts. (T.95, L. 5-14 (Dolan)). In order to comply with the standard offer, Florida Power altered the committed capacity of the sparrow

contract to 74.999 megawatts. (Ex. 8 at pp. 1, 3) Based on the position that Florida Power has now taken, Sparrow would have to fulfil that committed capacity obligation using a facility small than 75 megawatts.

RULING: Reject because this statement is unsupported by the greater weight of the evidence.

25. In due course the Commission approved Florida Power's petition to reject all standard offer contracts, except Panda's, over the objection of one of the competing bidders. (Ex. 10). In that same order, the Commission formally approved Panda's contract with Florida Power, including the terms calling for a 74.9 MW Committed Capacity and a 30 year contract term. *Id.* Thus, the Panda/Florida Power contract was approved by the Commission twice — once when the form was approved, and a second time when the Commission allowed Florida Power to select the contract completed by Panda over the competing contracts.

RULING: Reject as misleading *and* unsupported by the weight of the evidence. We approved a blank contract form one time. We approved Panda's standard offer contract with FPC only one time.

26. In approving the Panda contract, the Commission held that "Florida Power Corporation acted in the best interests of the ratepayers to select the contract which after a comparative evaluation was deemed by FPC to be the best available." (Ex. 10 at p. 3).

RULING: Accept.

27. Florida Power had signed the Panda contract prior to submitting it to the Commission. (T. 105, L. 3 (Dolan)). After the Commission approved Panda's contract, it therefore became a binding agreement between the parties.

RULING: Accept the first sentence of the proposed finding. Reject the second sentence as a Conclusion of Law rather than a Finding of Fact.

28. In 1993, the parties agreed to extend the milestone dates in their contract to require Panda to begin construction of its plant by January 1, 1996, and begin operation of the plant by January 1, 1997. (Ex. 11).

RULING: Accept.

29. Panda had to design a plant with a net generating capacity in excess of 74.9 megawatts to insure that it would be able to meet its 74.9 megawatt committed capacity obligation under all conditions. (T. 304, L. 23 - 306, L. 17 (Dietz)).

RULING: Reject as an argument rather than a finding of fact.

30. Prior to the summer of 1994, Florida Power never objected to the building of a facility that could generate in excess of 74.9 megawatts. (T. 392, L. 13-22 (Lindloff)); (T. 294, L. 8 - 295, L. 5 (Brinson)). However, in the summer of 1994, Florida Power objected to the construction by Panda of any plant larger than 74.9 megawatts. (T. 235, L. 20 - 236, L. 19 (Killian)). Florida Power then began insisting that Panda seek the approval of the Commission on the size issue. *Id.*

RULING: Reject as an argument and irrelevant to decide the factual matters at issue in this case.

31. In response to Florida Power's objection, Panda met with Commission staff in August of 1994, and received a confirmation letter from Joseph Jenkins, the director of the Commission's Division of Gas and Electric, stating that Panda's proposed facility

did not violate the contract or require approval of the Commission. (T. 243, L. 6 - 244, L. 5 (Killian)). This opinion did not dissuade Florida Power from continuing its dispute, and in January of 1995, Florida Power filed its . . . Petition (without advance notice to Panda) in this case seeking a declaration [by] the Commission on this issue.

RULING: Reject as irrelevant to decide the factual matters at issue in this case *and* as unsupported by the greater weight of the evidence.

32. In order to meet a 74.9 megawatt committed capacity at all times under all conditions, it is necessary to construct a plant with a maximum capacity above 74.9 megawatts. (T. 304, L. 23 - 306, L. 17 (Dietz)).

RULING: Reject as unclear. It is unclear whether the reference to "maximum" capacity is the net capacity of the facility or the gross rating of the generator.

33. It is necessary to build additional capacity to account for performance degradations caused by climate, aging of the plant, and other factors. *Id.*

RULING: Reject as unclear *and* as unsupported by the weight of the evidence.

34. Brian Dietz, Panda's chief engineer, was personally responsible for Panda's engineering decisions in planning the Panda-Kathleen plant, ,and it was his professional opinion that led Panda to select a plant design that could meet its 74.9 megawatt committed capacity obligations under all conditions. *Id.*

RULING: Reject as irrelevant to decide the factual matters at issue in this case. It is not relevant whose professional opinion Panda relied on.

35. In considering the design of the plant, Mr. Dietz determined that a plant with a minimum design capacity of 100 megawatts (at ISO conditions) was necessary to meet Panda's committed capacity obligations under all conditions. (T. 312, L. 10-17 (Dietz)).

RULING: Reject as opinion *and* unsupported by the weight of the evidence.

36. Mr. Dietz's conclusion corresponds to Florida Power's own recommendations. On September 29, 1992, Alan Honey of Florida Power recommended to Darol Lindloff of Panda that Panda utilize an equipment configuration using two LM 6000 turbines, which result in a design capacity of 95 to 100 megawatts at ISO conditions. (T. 392, L. 7-21 (Lindloff)). Ultimately, Panda determined that this LM 6000 turbine configuration would not meet Florida emissions requirements. (T. 318, L. 15-18 (Dietz)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

37. The plant design ultimately chosen by Panda used the smallest available turbine equipment which would assure generation of the Committed Capacity under all conditions, and also meet Florida's emissions requirements. (T. 319, L. 14 - 320, L. 4 (Dietz)).

RULING: Reject as unsupported by the weight of the evidence.

38. Florida Power did not put forth any credible evidence that a plant with a maximum capacity of 74.9 megawatts would be feasible under the contract. No expert or witness for Florida Power told this Commission what generators Panda could

select to build this facility that would put out 74.9 megawatts at all times under all conditions and meet Florida's emissions requirements, other than what Mr. Dietz selected.

RULING: Reject as irrelevant to decide the factual matters at issue in this case, as an argument rather than a finding of fact, *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

39. In Florida Power's other active cogeneration contracts (Ex. 2), many of the cogenerators serving Florida Power also designed their plants with maximum net generating capacities higher than their committed capacities. *See* (T. 73, L. 4-11 (Dolan) (Auburndale provides 131 megawatts of committed capacity from a 150 megawatt plant)); (T. 69, L. 15-72, L. 7 (Dolan) (Orange Cogen supplies 97 megawatts of committed capacity from a 104 to 106 megawatt plant).

RULING: Accept.

40. Florida Power currently buys power from other cogenerators who produce in excess of their committed capacity. For example, at times Florida Power buys up to 200 percent of the committed capacity generated by U.S. Agricultural. (T. 64, L. 1 - 66, L. 25 (Dolan)). U.S. Agricultural entered into the same standard offer contract form as Panda. (T. 65, L. 18-25 (Dolan).

RULING: Reject as misleading *and* as irrelevant to decide the factual matters at issue in this case. U.S. Agricultural signed a 5.1 MW standard offer contract with FPC. FPC witness Dolan testified that U.S. Agricultural would have subscribed for 10-MW if that amount had been available to subscribe to under FPC's standard offer contract.

41. Panda's design of its proposed plan was constrained by Florida's emissions requirements. It was the uncontradicted testimony of Brian Dietz that Florida's emission regulations were changed in 1992, and those changes severely limited the emissions that could be generated by Panda's plant. (T. 312, L. 21 - 313, L. 5 (Dietz)).

RULING: Reject the first proposed finding as unclear *and* as irrelevant to decide the factual matters at issue in this case. It is not indicated in what way Panda's proposed plant design was "constrained". Reject the second statement as an argument rather than a finding of fact.

42. As the result of those changes, Panda was limited in its options in selecting equipment, because only a small number of the generating equipment units available in the market could meet Florida's emission's requirements. (T. 317, L. 1 - T. 319, L. 8 (Dietz)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

43. Since Florida Power required Panda to have a backup source of fuel for its plant, Panda was forced to design its plan with oil as an auxiliary fuel. (T. 313, L. 7 - 314, L. 19 (Dietz)). The potential use of oil as a fuel eliminated Panda's ability to use certain kinds of emissions-limiting equipment. *Id.*

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

44. The plant configuration that Panda had originally submitted to Florida Power would not meet Florida's emissions requirements. (T. T. 318, L. 6-13 (Dietz)).

RULING: Reject as unclear *and* as irrelevant to decide the factual matters at issue in this case. It is not indicated the time frame during which Panda's plant configuration would not meet emission requirements.

45. Based on its considerations of degradation of performance and emissions, Panda ultimately determined that only two kinds of turbine equipment would meet the requirements of the Project - the ABB11N1 turbine (maximum capacity 115 megawatts) and the GE Frame 7 (maximum capacity 118 megawatts). (T. 318, L. 25 - 319, L. 8 (Dietz). Of these two, only ABB would guarantee a delivery time, and Panda ultimately chose the ABB11N1. *Id.*

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

46. The contract between the parties contains no express limitation on the net generation size of the plant to be constructed by Panda. Rather, the contract specifically limits only the amount of Committed Capacity that Florida Power is obligated to purchase from Panda to 74.9 megawatts. Ex. 30 at ¶ 7.1.

RULING: Reject as unsupported by the greater weight of the evidence. Appendix E to the standard offer contract contains Rule 25-17.0832, Florida Administrative Code, which limits the net output of facilities accepting the standard offer contract.

47. The contract expressly limits the amount of Committed Capacity that may be contracted for, by providing that "[t]he availability of this Agreement is subject to . . .the Facility having a Committed Capacity which is less than 75,000 KW." Ex. 30 at ¶ 2.1.2.

RULING: Accept.

48. Florida Power has stated that the 75 megawatt size cap that it seeks to impose pertains to net capacity of a plant under "normal conditions". (T. 159, L. 11-15 (Dolan)). However, in its 1992 Petition to approve the Panda contract, Florida Power used the word "size" to refer to the committed capacity of the project, not the capacity of the plant to be constructed. (T. 94, L. 6-9 (Dolan); (Ex. 10 at pp. 1, 15). In that Petition, Florida Power repeatedly described the Panda project as 74.9 megawatts in size. *Id.*

RULING: Reject an argument rather than a finding of fact *and* as irrelevant to decide the factual matters at issue in this case.

49. The actions of both parties, after the contract was entered into, support Panda on the fact that the contract does not limit the net generation size of Panda's facility. Both parties proceeded on the understanding that Panda was not limited to a 75 megawatt plant.

RULING: Reject as irrelevant to decide the factual matters at issue in this case *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

50. Florida Power was advised on several occasions, beginning in 1992, that Panda was considering building a plant with a maximum capacity of 110 megawatts to 115 megawatts. (T. 294, L. 22 (Brinson); (T. 390, L. 22 - 391, L. 2; (Lindloff)). Florida Power did not object to Panda's plans, and indeed encouraged Panda to build a plant larger than 74.9 megawatts. (T. 392, L. 13-21 (Lindloff)). In fact, Florida Power's representative recommended to Panda that Panda construct a plant with an approximate maximum output of 95 to 100 megawatts. *Id.*

RULING: Reject the first sentence of the proposed finding as irrelevant to decide the factual matters at issue in this case. Reject the second sentence as unsupported by the greater weight of the evidence. The record indicates that FPC first informed Panda of the *Polk Power Partners* decision, then suggested that Panda seek a declaratory statement from us regarding the proposed facility's size. Reject the third sentence as an argument rather than a finding of fact.

51. Florida Power was aware that Panda's initial proposal, which would utilize 3 LM2500 turbines, would have put out in excess of 75 megawatts. (T. 106, L. 5-9 (Dolan)); (T. 226, L. 8-10). That preliminary configuration proposal was not ultimately adopted by Panda because it could not meet the 74.9 megawatt Committed Capacity under all conditions, nor could it meet Florida emissions requirements. (T. 318, L. 6-13 (Dietz)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case *and* as unsupported by the weight of the evidence. The above-referenced transcript cite states that three LM2500 turbines would occasionally produce more than 75 MW.

52. Neither Florida Power nor the ratepayers would be damaged by Panda's proposed design. Panda has not argued that Florida Power would have to pay anything more than as-available prices for any output above 74.9 MW, and Florida Power would be able to curtail Panda from producing more than 74.9 megawatts in low-load conditions. (T. 155, L. 16-24 (Dolan)). The only harm asserted by Florida Power in this proceeding — the theoretical potential to occasionally have to cycle off two existing plants more often — was shown on cross

examination to be admittedly *de minimus* "harm". (T. 430, L. 20-431, L. 13 (Dolan)).

RULING: Reject as unclear *and* as an argument rather than a finding of fact. It is unclear what is meant by the term "damaged", and FPC witness Dolan did not testify that cycling off two units would result in *de minimus* harm.

53. Florida Power encouraged Panda to design a plant with a net generating capacity larger than 74.9 megawatts, and Florida Power has attempted to create contract disputes in an attempt to escape from its contract with Panda.

RULING: Reject as an argument rather than a finding of fact, as irrelevant to decide the factual matters at issue in this case, *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

54. In 1993 and 1994, Florida Power crafted a global strategy to decrease and/or eliminate the purchases of power from cogenerators. At that time, Florida Power considered cogenerators to be competitors with it in the business of wholesaling electricity, and had lost some business to them. (T. 138, L. 3-10 (Dolan)). That strategy was based on Florida Power's view that "at the present time, the QF contracts are not cost effective when compared to FPC built natural gas fired combined cycle units . . . [Florida Power's] resources need to be assigned to properly evaluate and implement, if feasible, all of the options available to increase the cost-effectiveness of the QF contracts." (T. 237 (Killian)). This statement, which was contained in Florida Power's Cogeneration Review, reflects a desire to escape cogeneration contracts.

RULING: Reject as an argument rather than a finding of fact *and* as irrelevant to decide the factual matters at issue in this case.

55. Florida Power investigated the possibility of buying out certain contracts, including Panda's contract. To that end, Florida Power formed a "NUG" (non-utility generated) buyout committee. (T. 122, L. 7-15 (Dolan)). Florida Power considered buying out any contract on which plant construction had not yet begun. (Ex. 15).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

56. At the time of the Cogeneration Review, Florida had overbooked committed capacity and had far more committed capacity than it initially anticipated. (T. 123, L. 14-24 (Dolan)). Florida Power had deliberately overbooked its cogeneration contracts in 1991 in anticipation that some of those projects would not be built. *Id.* All the projects, however, did come to fruition. *Id.*

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

57. Florida Power implemented its cogeneration strategy by "actively enforcing" its contracts and attempting to identify "breaches" by cogenerators, no matter how small, which would allow it to escape its obligations. (Ex. 14 at p. 10).

RULING: Reject as irrelevant to decide the factual matters at issue in this case *and* as an argument rather than a finding of fact.

58. Florida Power has admitted that it concluded in 1994 that [it] did not, and does not, want Panda to build its plant. (T. 129, L. 1-8 (Dolan)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

59. Florida Power's intentions are further clarified by other examples of its treatment of Panda. In late 1993 and early 1994, Panda was considering the relocation of its thermal host in order to accommodate additional steam use. Florida Power refused to agree to such a move, despite the lack of any effect whatsoever on Florida Power's interests. (T. 129, L. 11 - 130, L. 22 (Dolan).

RULING: Reject as an argument rather than a finding of fact *and* as irrelevant to decide the factual matters at issue in this case.

60. In an internal memorandum discussing the refusal to allow a change of site, Florida Power noted that it did not wish to "throw Panda a lifeline". (T. 130, L. 21-22 (Dolan)); (Ex. 13).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

61. Florida Power's representatives dissuaded Panda from seeking a determination from the Commission regarding the sizing of Panda's plant.

RULING: Reject as irrelevant to decide the factual matters at issue in this case, as unsupported by the greater weight of the evidence, *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

62. Panda's representative, Joseph Brinson, was told by Florida Power's representative, Robert Dolan, that "size was not a problem to FPC, but that we should not talk with the Florida Public Service Commission on installing a 110 MW plant, and that we should be

careful dealing with the Public Service Commission while ARK Energy was still challenging the FPC/Panda contract". (T. 294, L. 25 - 295, L. 4 (Brinson)). Robert Dolan admitted that he did not want Panda to go to the Commission because he did not want Panda to "muddy the waters" while the Commission was considering whether to allow Florida Power to select Panda's contract. (T. 115, L. 3-7 (Dolan)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

63. The contract explicitly defines the length of the parties' duties to perform: The term of this agreement shall begin on the Execution Date and shall expire at 24:00 hours on the last day of March 2025, unless extended pursuant to section 4.2.4 hereof or terminated in accordance with the provisions of this agreement. Ex. 30 at ¶ 4.1

RULING: Accept.

64. In addition, the contract provides that "the Committed Capacity shall be made available at the point of delivery from the Contract in-Service Date through the remaining term of the agreement". Ex. 30 at ¶ 7.1; (T. 171, L. 10-13 (Dolan)). As compensation for the provision of that Committed Capacity, "the Company agrees to purchase, accept and pay for the Committed Capacity made available at the point of delivery in accordance with the terms and conditions of this Agreement. Ex. 30 at ¶ 6.1. Based on these contractual obligations, the contract obligates Florida Power to make capacity payments for the entire period in which it provides firm committed capacity to Florida Power.

RULING: Accept the first and second sentences of the proposed finding. Reject the third sentence as a Conclusion of Law rather than a Finding of Fact.

65. In 1990, Florida Power submitted a draft of its standard offer contract to the Commission for approval. (T. 87, l. 2-8 (Dolan)) (Ex. 5). That contract had a schedule which listed capacity payments for thirty years, but defined an avoided unit of only twenty years. (Ex. 5). That draft standard offer contract was sent by Florida Power to Panda. (Ex. 4).

RULING: Reject as irrelevant to decide the factual matters at issue in this case. Regardless of what was stated on a draft contract, it is not the contract that was approved by us and signed by Panda.

66. In his testimony, Robert Dolan of Florida Power asserted that it has always been his view that Florida Power was only obligated to make capacity payments for 20 years. Mr. Dolan testified that the capacity provided by Panda for years 21 through 30 of the contract would be "free". (T. 91, L. 9-15; 101, L. 2 - 103, L. 22 (Dolan)). On cross-examination, Mr. Dolan admitted that he could not identify any clause in the contract which specifically states that Florida Power is only responsible for paying for as-available energy for the last ten years of the contract. (T. 170, L. 4 - 18 (Dolan)).

RULING: Accept with the clarification that Mr. Dolan stated that "we had researched the contract to make this determination."

67. Mr. Dolan never voiced his opinion to Panda or the Commission regarding the length of capacity payments, even when the Florida Power was seeking approval of the contract. (T. 101, L. 20 - 103, L. 2; 168, L. 17 - 169, L. 1 (Dolan)). If the contract did indeed provide for 10 years of free capacity, that free capacity would have been of benefit to the ratepayers, and Florida Power would

have cited that interpretation when seeking approval of the Panda contract.

RULING: Reject as irrelevant to decide the factual matters at issue in this case *and* because transcript cite does not support the second statement.

68. The schedules attached to the contract do not limit Florida Power's capacity payments to 20 years. Appendix "C" to the contract, states on its face payments should be made in accordance with Rule 25-17.0832(4), as referenced in Paragraph 8.2 of the Contract. (Ex. 30 at Appendix "C").

RULING: Reject the first sentence of the proposed finding as an argument rather than a finding of fact. Accept the second sentence.

69. Rule 25-17.0832(4) requires only that an illustrative schedule of payments be attached to a standard offer that goes out at least ten years. It is not necessary that such a schedule be attached covering the full term of the contract. Appendix "C" to the Panda contract is such an illustrative schedule.

RULING: Accept with the clarification that it is Rule 25-17.0832(3)(e)3. that contains this requirement, not Rule 25-17.0832(4).

70. Roy Shanker, an expert witness sponsored by Panda, presented the only testimony regarding the use of the value of deferral method in interpreting the contract, and testified that the payment of thirty years of capacity payments was mandated by the contract using that method. (T. 512, L. 5 - 513, L. 3 (Shanker)).

RULING: Reject as unsupported by the evidence. Panda witness Shanker did not state the 30 years of capacity payments was **mandated**, only

that 30 years of capacity payments was not inconsistent with value of deferral theory.

71. The value of deferral method, codified in Rule 25-17.0832 and Article VIII of the Contract, provides the basis for the calculation of capacity payments to be paid to cogenerators. *Id.* That method calculates the costs avoided by the utility when the utility is able to defer the expense of building a new plant by purchasing firm capacity from a cogenerator.

RULING: Accept the first sentence of the proposed finding. Reject the second sentence as unclear.

72. In this case, Florida Power will be able to avoid building 115 megawatts of capacity for a period of thirty years. Therefore, the value of deferral method provides that Florida Power must pay Panda for each of the thirty years in which Florida Power has avoided the cost of building a plant. *Id.*

RULING: Reject as an argument rather than a finding of fact.

73. Florida Power has argued that the contract provides that the "plant life" of the avoided unit at issue is only twenty years, and therefore Florida Power is only obligated to pay capacity payments for the "plant life" of the avoided unit. However, the contract obligates Panda to supply Florida Power firm capacity for thirty years, not twenty. Thus, Florida Power is avoiding having to build that much capacity for thirty years, and Panda must be compensated for that.

RULING: Reject as an argument rather than a finding of fact *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

74. If Panda is not paid for providing capacity for the last ten years of the contract, a windfall to Florida Power would result. (T. 519, L. 16 - 520, L. 9 (Shanker)).

RULING: Reject as an argument rather than a finding of fact.

75. Panda presented testimony from several witnesses regarding discussions with Florida Power representatives in which the subject of capacity payments were discussed. In those discussions, Florida Power's representative conceded that the capacity payments needed to be made for the last ten years of the contract.

RULING: Reject as irrelevant to decide the factual matters at issue in this case, as an argument rather than a finding of fact, *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

76. Darol Lindloff and Ralph Killian attended a meeting with Florida Power representatives in which Florida Power admitted that it needed to do something to provide capacity payments to Panda for the last ten years of the contract. (T. 233, L. 14 - L. 234, L. 21 (Killian)); (T. 394, L. 20 - 395, L. 5 (Lindloff)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case.

77. The calculation of payments for years 21 through 30 of the contract requires an application of the formulas contained in the contract, and requires no external fact finding. As testified by Roy Shanker, the value of deferral method contained in the contract and in the Commission's rules provides that the capacity payments for year 20 of the contact may

be escalated by 5.1 percent to derive the year 21 payments, and that this procedure should be used for each year until year 30. (T. 535, L. 7-21 (Shanker)).

RULING: Reject as an argument rather than a finding of fact.

78. Appendix "C" of the Contract provides the amount of firm capacity payments for years 1 through 20 of the Contract, and firm capacity payments to Panda for years 21 through 30 of the Contract should be computed by escalating the payments due Panda at year 20 at a rate of 5.1% per year. (T. 538, L. 3-19 (Shanker)). A copy of those calculations was introduced in evidence as Exhibit 37.

RULING: Reject as an argument rather than a finding of fact.

79. The contract provides certain milestone dates for the inception and completion of the construction of Panda's plant. Pursuant to a previous agreement between the parties, those dates were extended to require construction to begin by January 1, 1996 and be completed by January 1, 1997. (Ex. 11).

RULING: Accept.

80. By filing its Petition, Florida Power interfered with Panda's ability to perform under the contract. There is no dispute on this point. (T. 248, L. 1-11 (Killian)); (T. 449, L. 20 - 450, L. 9; 472, L. 16-21; 502, L. 9-20 (Morrison)).

RULING: Reject as an argument rather than a finding of fact.

81. By the time of the Petition, Panda had undertaken substantial progress toward compliance with the contract. (T. 248, L. 1-11 (Killian)).

RULING: Reject as the transcript cite does not support this statement.

82. Panda had an executed indication of interest from its primary lenders, the Bank of Tokyo and Bayerische Vereinsbank. (T. 468, L. 18-25 (Morrison)); (Ex. 33).

RULING: Accept.

83. Panda had prepared documentation to create a thermal host, and that host was approved by FERC. (T. 474, L. 9 - 475, L. 2 (Morrison)).

RULING: Accept.

84. Panda and its lenders were schedule to close on financing, using medium term notes ("MTN") in March of 1995. (T. 493, L. 23 - 494, L. 1; 501, L. 18 - 502, L. 2 (Morrison)); (Ex. 36, p. 2).

RULING: Accept.

85. Prior to the disputes at issue in this case, it was Florida Power's opinion that Florida Power's standard offer contract was structured in such a way as to make it impossible for a cogenerator to obtain financing. (T. 140, L. 16-23 (Dolan)).

RULING: Reject as irrelevant to decide the factual matters at issue in this case *and* as unsupported by the greater weight of the evidence. FPC witness Dolan said that it may difficult, even impossible, for a cogenerator to finance a contract based on combustion turbine unit payments "using nonrecourse, high leverage financing." (Tr. 140, lines 22-23).

86. Since Panda's inability to meet the milestone dates is attributable to Florida Power's actions, an extension of the milestone dates is appropriate.

RULING: Reject as an argument rather than a finding of fact *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

87. This Commission makes no finding as to whether Panda would have been able to complete its financing. The Commission does not find Florida Power's arguments on this issue relevant at this time, given the issues raise. Panda is merely asking for the opportunity to complete its financing and construct its plant, and is entitled to that opportunity.

RULING: Reject as an argument rather than a finding of fact *and* because there is no transcript or exhibit cite for this statement, as required by Rule 25-22.056(2), Florida Administrative Code.

88. Ralph Killian testified that Florida Power's actions caused Panda to lose its place inline for the generating equipment it needs to build its plant. (T. 548, 15-18; 549, L. 24-25 (Killian)). In addition, Mr. Killian testified that Florida Power's actions caused Panda to lose its financing. *Id.* Based on these occurrences, Panda will need a period of eighteen months from the date of this Commission's order to start construction of the plant, and will need an additional eighteen months to complete that construction. (T. 548, L. 18-23; 550 L. 13 - 551, L. 2; 551 L. 12-17 (Killian)).

RULING: Reject as an argument rather than a finding of fact.

89. The payments to Panda for committed capacity and energy are specifically provided on the contract, and

may be obtained directly from the contract. The payments to Panda under the contract for a particular year have been computed in Exhibit 37.

RULING: Reject as not supported by the greater weight of the evidence.

90. Panda's expert, Roy Shanker, testified that the calculations contained in Exhibit 37 are obtained through a mechanical escalation of 5.1 percent for each year of the contract. (T. 538, L. 3-19 (Shanker)).

RULING: Accept.

SUPREME COURT OF Florida

THURSDAY, NOVEMBER 13, 1997

PANDA-KATHLEEN, L.P., PANDA ENERGY CORPORATION,	*	
Appellant,	*	
v.	*	CASE NO. 88,280
SUSAN F. CLARK, et al.,	*	
Appellees.	*	

* * * * * * * * * * * * * * * * * *

Appellant's Motion for Rehearing is hereby denied.

KOGAN, C.J., OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur

SHAW, J., dissents

16 U.S.C. § 824a-3(a)-(h)

§ 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage goethermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities [FN1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase —

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration

facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C.A. § 791A et seq.], from the Public Utility Holding Company Act [15 U.S.C.A. § 79 *et. seq.*], from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 796(17)(E) of this title) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act [15 U.S.C.A. § 79 et seq.] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C.A. § 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C.A. § 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act]16 U.S.C.A. § 791a et seq.], any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any

requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by Commission under subsection (a) of this section with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 U.S.C.A. § 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C.A. § 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of a subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C.A. § 791a et seq.]. For purposes of any such action, State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section [FN1] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the

Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issued such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.* (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or

down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel Operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

§ 292.304 Rates for purchases.

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchase satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section.

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless

of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) *Standard Rats for Purchases*. (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) *Purchases "as available" or pursuant to a legally enforceable obligation*. Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility

exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) *Factors affecting rates for purchases.* In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.* (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

Rule 25-17.0832(3), Florida Administrative Code

3. Standard Offer Contracts.

(a) Upon petition by a utility or pursuant to a Commission action, each public utility shall submit for Commission approval a tariff or tariffs and a standard offer contract or contracts for the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts or from solid waste facilities as defined in Rule 25-17.091.

(b) The rates, terms, and other conditions contained in each utility's standard offer contract or contracts shall be based on the need for and equal to the avoided cost of deferring or avoiding the construction of additional generation capacity or parts thereof by the purchasing utility. Rates for payment of capacity sold by a qualifying facility shall be specified in the contract for the duration of the contract. In reviewing a utility's standard offer contract or contracts, the Commission shall consider the criteria specified in paragraphs (2)(a) through (2)(d) of this rule, as well as any other information relating to the determination of the utility's full avoided costs.

(c) In lieu of a separately negotiated contract, a qualifying facility under 75 megawatts or a solid waste facility as defined in Rule 25-17.091(1), F.A.C., may accept any utility's standard offer contract. Qualifying facilities which are 75 megawatts or greater may negotiate contracts for the purchase of capacity and energy pursuant to subsection (2). Should a utility fail to negotiate in good faith, any qualifying facility may apply to the Commission for relief pursuant to Rule 25-17.0834, F.A.C.

(d) Within 60 days of receipt of a signed standard offer contract, the utility shall either accept and sign the contract and return it within five days to the qualifying facility or petition the Commission not to accept the contract and provide justification for the refusal. Such petitions may be based on:

1. a reasonable allegation by the utility that acceptance of the standard offer will exceed the subscription limit of the avoided unit or units; or

2. material evidence that because the qualifying facility is not financially or technically viable, it is unlikely that the committed capacity and energy would be made available to the utility by the date specified in the standard offer.

A standard offer contract which has been accepted by a qualifying facility shall apply towards the subscription limit of the unit designated in the contract effective the date the utility receives the accepted contract. If the contract is not accepted by the utility, its effect shall be removed from the subscription limit effective the date of the Commission order granting the utility's petition.

(e) Minimum Specifications. Each standard offer contract shall, at minimum, specify:

1. the avoided unit or units on which the contract is based;

2. the total amount of committed capacity, in megawatts, needed to fully subscribe the avoided unit specified in the contract;

3. the payment options available to the qualifying facility including all financial and economic assumptions necessary to calculate the firm capacity payments available under each payment option and an illustrative calculation of firm capacity payments for a minimum ten-year term contract commencing with the in-service date of the avoided unit for each payment option;

4. the date on which the standard contract offer expires. This date shall be at least four years before the anticipated in-service date of the avoided unit or units unless the avoided unit could be constructed in less than four years, or when the subscription limit has been reached;

5. the date by which firm capacity and energy deliveries from the qualifying facility to the utility shall commence. This date shall be no later than the anticipated in-service date of the avoided unit specified in the contract;

6. the period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility. Firm capacity and energy shall be delivered, at a minimum, for a period of ten years, commencing with the

anticipated in-service date of the avoided unit specified in the contract. At a maximum, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit;

7. the minimum performance standards for the delivery of firm capacity and energy by the qualifying facility during the utility's daily seasonal peak and off-peak periods. These performance standards shall approximate the anticipated peak and off-peak availability and capacity factor of the utility's avoided unit over the term of the contract;

8. provisions to ensure repayment of payments to the extent that annual firm capacity and energy payments made to the qualifying facility in any year exceed that year's annual value of deferring the avoided unit specified in the contract in the event that the qualifying facility fails to perform pursuant to the terms and conditions of the contract. Such provisions may be in the form of a surety bond or equivalent assurance of repayment of payments exceeding the year-by-year value of deferring the avoided unit specified in the contract.

(f) The Commission may approve contracts that specify:

1. provisions to protect the purchasing utility's ratepayers in the event the qualifying facility fails to deliver firm capacity and energy in the amount and times specified in the contract which may be in the form of an up-front payment, surety bond, or equivalent assurance of payment. Such payment or surety shall be refunded upon completion of the facility and demonstration that the facility can deliver the amount of capacity and energy specified in the contract; and

2. a listing of the parameters, including any impact on electric power transfer capability, associated with the qualifying facility as compared to the avoided unit necessary for the calculation of the avoided cost.

(g) Firm Capacity Payment Options. Each standard offer contract shall also contain, at a minimum, the

following options for the payment of firm capacity delivered by the qualifying facility:

1. Value of deferral capacity payments. Value of deferral capacity payments shall commence on the anticipated in-service date of the avoided unit. Capacity payments under this option shall consist of monthly payments escalating annually of the avoided capital and fixed operation and maintenance expense associated with the avoided unit and shall be equal to the value of a year-by-year deferral of the avoided unit, calculated in accordance with paragraph (5)(a) of this rule.

2. Early capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and contract the avoided unit. Early capacity payments shall consist of monthly payments escalating annually of the avoided capital and fixed operation and maintenance expense associated with the avoided unit, calculated in conformance with paragraph (5)(b) of the rule. At the option of the qualifying facility, early capacity payments may commence at any time after the specified early capacity payment date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1. of this rule.

3. Levelized capacity payments. Levelized capacity payments shall commence on the anticipated in-service date of the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance portion of capacity payments shall be equal to the value of the year-by-year deferral of fixed operation and maintenance expense

associated with the avoided unit calculated in conformance with paragraph (5)(a) of this rule. Where levelized capacity payments are elected, the cumulative present value of the levelized capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1. of this rule, value of deferral capacity payments.

4. Early levelized capacity payments. Each standard offer contract shall specify the earliest date prior to the anticipated in-service date of the avoided unit when early levelized capacity payments may commence. The early capacity payment date shall be an approximation of the lead time required to site and construct the avoided unit. The capital portion of capacity payments under this option shall consist of equal monthly payments over the term of the contract, calculated in conformance with paragraph (5)(c) of this rule. The fixed operation and maintenance expense shall be calculated in conformance with paragraph (5)(b) of this rule. At the option of the qualifying facility, early levelized capacity payments shall commence at any time after the specified early capacity date and before the anticipated in-service date of the avoided unit provided that the qualifying facility is delivering firm capacity and energy to the utility. Where early levelized capacity payments are elected, the cumulative present value of the capacity payments made to the qualifying facility over the term of the contract shall not exceed the cumulative present value of the capacity payments which would have been made to the qualifying facility had such payments been made pursuant to subparagraph (3)(g)1. of this rule.

§ 366.051, Florida Statutes (1995)

Cogeneration; small power production; commission jurisdiction. — Electricity produced by cogeneration and small power production is of benefit to the public when included as part of the total energy supply of the entire electric grid of the state or consumed by a cogenerator or small power producer. The electric utility in whose service area a cogenerator or small power producer is located shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator or small power producer; or the cogenerator or small power producer may sell such electricity to any other electric utility in the state. The commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers and may set rates at which a public utility must purchase power or energy from a cogenerator or small power producer. In fixing rates for power purchased by public utilities from cogenerators or small power producers, the commission shall authorize a rate equal to the purchasing utility's full avoided costs. A utility's "full avoided costs" are the incremental costs of the utility of the electric energy or capacity, or both, which, but for the purchase from cogenerators or small power producers, such utility would generate itself or purchase from another source. The commission may use a statewide avoided unit when setting full avoided capacity costs. If the cogenerator or small power producer provides adequate security, based on its financial stability, and no costs in excess of full avoided costs are likely to be incurred by the electric utility over the term during which electricity is to be provided, the commission shall authorize the levelization of payments and the elimination of discounts due to risk factors in determining the rates. Public utilities shall provide transmission or distribution service to enable a retail customer to transmit electrical power generated by the customer at one location to the customer's facilities at another location, if the commission finds that the provision of this service, and the charges, terms and other conditions associated with the provision of this service, are not likely to result in higher cost electric service to the utility's general body of retail and wholesale customers or adversely affect the adequacy or reliability of electric service to all

customers. Notwithstanding any other provision of law, power generated by the customer and provided by the utility to the customers' facility at another location is subject to the gross receipts tax imposed under s.203.01 and the use tax imposed under s.212.06. Such taxes shall apply at the time the power is provided at such other location and shall be based upon the cost price of such power as provided in s.212.06(1)(b).

§ 292.602 Exemption to qualifying facilities from the Public Utility Holding Company Act and certain State law and regulation.

(a) *Applicability*. This section applies to any qualifying facility described in § 292.601(a), and to any qualifying small power production facility with a power production capacity over 30 megawatts if such facility produces electric energy solely by the use of biomass as a primary energy source.

(b) *Exemption from the Public Utility Holding Company Act of 1935*. A qualifying facility described in paragraph (a) of this section or a utility geothermal small power production facility shall not be considered to be an "electric utility company" as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3).

(c) *Exemption from certain State law and regulation*. (1) Any qualifying facility shall be exempted (except as provided in paragraph (c)(2)) of this section from Sate law or regulation respecting:

(i) The rates of electric utilities; and

(ii) The financial and organizational regulation of electric utilities.

(2) A qualifying facility may not be exempted from State law and regulation implementing subpart C.

(3) Upon request of a State regulatory authority or nonregulated electric utility, the Commission may consider a limitation on the exemptions specified in paragraph (c)(1) of this section.

(4) Upon request of any person, the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding eligibility for Standard Offer contract and payment thereunder by Florida Power Corporation.	Docket No. _____ Submitted for filing: January 25, 1995

PETITION FOR DECLARATORY STATEMENT

Florida Power Corporation ("Florida Power" or "the Company") hereby submits this Petition for Declaratory Statement pursuant to Section 120.565, F.S., and Rule 25-22.020, F.A.C. Florida Power seeks a declaration that the Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less than 75 MW or a Solid Waste Facility between Panda-Kathleen L.P. and Florida Power Corporation dated November 25, 1991 (the "Standard Offer Contract") is not available to Panda-Kathleen L.P. ("Panda") if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce 115 megawatts ("MW"). In addition, if the Standard Offer Contract is available to Panda, Florida Power seeks a further declaration that it has no obligation to make capacity or energy payments under the Standard Offer Contract after the December, 2016.

INTRODUCTION

1. The name of the Petitioner and its business address is:

Florida Power Corporation
3201 - 34th Street South
Post Office Box 14042
St. Petersburg, FL 33733-4042

2. All notices, pleadings and correspondence should be directed to:

James P. Fama
James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

DISCUSSION

A. Availability of the Standard Offer Contract.

3. On November 25, 1991, Panda and Florida Power entered into the Panda Standard Offer Contract (Exhibit 1) pursuant to Rule 25-17.032(3)(a) and (c), Florida Administrative Code. The rule provides for standard offer contracts involving "small qualifying facilities less than 75 megawatts . . . ." The Panda Standard Offer Contract is expressly titled "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less Than 75 MW or a Solid Waste Facility."

4. The Commission has expressly considered the application of Rule 25-17.032 to projects which have a total net generating capacity in excess of 75 MW, and ruled that such projects do *not* qualify to take advantages of standard offer contracts. Order No. PSC-92-0683-DS-EQ, dated July 21, 1992. (Exhibit 2). In so ruling, the Commission entered an Order Granting Declaratory Statement In The Negative on a request by Polk Power Partners to take advantage of a standard [offer] contract for a facility that had a net generating capacity in excess of the 75 MW cap. *See also,* Order No. PSC-94-1306-FOF-EQ, dated October 24, 1994 ("the Commission's current Rule 25-17.0832(3)(a) . . . limits the availability of Standard Offer Contracts to Qualified Cogeneration Facilities (QF) under 75 MW.") (Exhibit 3).

5. Despite the 75 MW cap identified both in Rule 25-17.032(3)(a) and in the Panda Standard Offer

Contract, Panda proposes to install either a GE Frame 7 EA or an ABB 11 N1 combustion turbine in a combined cycle configuration for its cogeneration project. This configuration would produce 115 MW or more, in violation of the 75 MW cap imposed by Rule 25-17.0832 and the Panda Standard Offer Contract itself.

6. FPC has repeatedly expressed its belief to Panda that this Standard Offer Contract is not available with respect to Panda's proposed facility. (*See, e.g.*, Exhibit 4). FPC further advised Panda that it should obtain a ruling from this Commission on this issue and that FPC would comply with the Commission's ruling thereon. It was FPC's understanding that Panda intended to obtain such a ruling from the FPSC.

7. However, Panda has not sought a decision from the Commission regarding the availability of, and its rights under, the Panda Standard Offer Contract in light of the project's 115 MW size. Rather, Panda has simply discussed the matter on an informal basis with FPSC staff. Its discussions are described in the letter from Barrett G. Johnson to Joseph D. Jenkins dated August 23, 1994. (Exhibit 5). Mr. Jenkins responded by letter of August 24, 1994, to Barrett G. Johnson, (Exhibit 6), and Panda has asserted that this letter constitutes approval of their proposed action.

8. FPC believes that the Commission's express rulings in Order Nos. PSC-92-0683-DS-EQ and 94-1306-FOF-EQ, as well as the express terms of both Rule 25-17.0832 and the Panda Standard Offer Contract, clearly prohibit the availability of the Standard Offer Contract to a facility producing more than 75 MW. However, since Panda has not sought a ruling from the Commission as to the availability of the Standard Offer Contract for this proposed facility, Florida Power accordingly requests the Commission to declare the applicability of its rules and orders governing standard offer contracts to Panda's proposed 115 MW cogeneration facility.

B. Determination of the Panda Standard Offer Contract's Payment Terms.

9. Under the terms of the Panda Standard Offer Contract, Florida Power's capacity payment obligations terminate at the end of 20 years, which will be December 2016. Among other things, Appendix C, Schedule 2 of the Contract states that the economic life of the avoided unit is 20 years, and the capacity payments were calculated on that explicit basis. (Exhibit 7). Had the contract been for a term of 30 years, the monthly capacity payments would have been correspondingly reduced. Moreover, it is for this reason that all payment schedules in the Appendices are defined only through the year 2016, a twenty year period.

10. Despite these contractual provisions and limiting terms, Panda attempted to modify the term of its Standard Offer Contract by writing in an expiration date of March, 2025. On that basis, Panda now takes the position that FPC is obligated to make capacity payments in some unspecified amount under the Panda Standard Offer Contract for an additional ten years after the year 2016. See letter dated August 10, 1994 from Kyle Woodruff, Project Manager of Panda to Robert D. Dolan, P.E., Manager, Cogeneration Contracts of Florida Power. (Exhibit 8). Panda may also take the position that Florida Power is obligated by contract to purchase as available energy after the year 2016.

11. This attempt by Panda to modify the Standard Offer Contract is improper and conflicts with the terms of the contract that was presented to it by Florida Power and which explicitly contemplated a contract term and contract payments not to exceed 20 years. As the Commission ruled in Order No. PSC-94-0488-FOF-EQ: "Like any unilateral contract, no changes can be made to a Standard Offer Contract without the consent of the utility. Any changes to the Standard Offer Contract would necessitate negotiation which would negate the use of the Standard Offer Contract." (Exhibit 9). In so ruling, the Commission granted the petition of Tampa Electric Company not to accept the standard offer contract of Polsky

Energy Corporation because Polsky had made changes to that contract.

NEED FOR DECLARATORY STATEMENT

12. Florida Power has a real and immediate need for the requested declaratory statement as it relates to its own particular circumstances only. The Commission's declaratory statement as to the correct application of Rule 25-17.0832, F.A.C., and its orders establishing the availability of Standard Offer Contracts and the ability of Panda to change the terms of this Standard Offer Contract will ensure that Florida Power and its customers will only pay for capacity and energy from facilities properly configured to take advantage of this Standard Offer Contract, and that FPC and its customers will, in addition, have no contractual obligation to pay for capacity and energy purchased from Panda other than as expressly provided for in that Standard Offer Contract. A timely resolution of these essential questions will enable Florida Power to plan its needs and its financial obligations to this QF in an orderly manner.

WHEREFORE, Florida Power Corporation requests that the Commission enter an order declaring that the Panda Standard Offer Contract is not available to Panda-Kathleen L.P. if it configures its facility to have a capacity of 75 MW or more; and, if the Standard Offer Contract is nevertheless available to Panda, to declare that Florida Power has no obligation under the Contract to make any

energy or capacity payments to Panda after December 2016.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL FLORIDA POWER CORPORATION

By /s/

James P. Fama
James A. McGee
Post Office Box 14042
St. Petersburg, FL 33733-4042
Telephone: (813) 866-5184
Facsimile: (813) 866-4931

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Declaratory Statement Regarding Eligibility for Standard Offer Contract and Payment Thereunder by Florida Power Corporation

Docket No. 950110EI

---

(1) MOTION TO STAY OR ABATE PROCEEDINGS, (2) MOTION TO DISMISS AND (3) SUPPORTING MEMORANDUM

Pursuant to Rule 25-22.037(2)(a), F.A.C., Panda-Kathleen, L.P. ("Panda") files this (1) Motion to Stay, (2) Motion to Dismiss the Complaint filed by Florida Power Corporation ("FPC") in the above docket on January 25, 1995, and (3) Supporting Memorandum on the grounds that the Florida Public Service Commission ("the Commission") does not have jurisdiction (1) over Panda or (2) the claims asserted by FPC and that (3) all issues hearings, discovery and related scheduled proceedings in this Docket should be stayed or abated until a final decision on Panda's Motion to Dismiss (including any appeals) has been made.

I.

INTRODUCTION

A. In Docket No. 910004-EU, the Commission determined that FPC's avoided unit for a "standard offer contract"[1] was a 1997 combustion turbine. FPC prepared

---

[1] Although Panda does not accept the lawfulness of any valid distinction between a "negotiated" and a "standard offer" power purchase agreement or contract, these terms will be

(continued . . .)

and filed with the Commission a proposed standard offer contract and a proposed tariff of rates to be paid by FPC to cogenerators such as Panda. The Commission approved the form, content, terms and conditions of FPC's standard offer contract and the FPC tariff of contract rates filed with the Commission, thereby establishing the rates for payment by FPC to the cogenerators, such as Panda, for the cogenerator's sale of wholesale electric power to FPC under the contract. Order No. 24989, issued August 29, 1991.

After the Commission's order, the Commission and FPC conducted a two-week "open season", between September 20 and October 4, 1991, soliciting cogenerators to consider and sign such contracts at these rates; the FPC received several signed contracts, including one from Panda. On November 19, 1991 FPC petitioned the Commission for authority to reject the first standard offer contract it had received and, subsequently, on November 26, 1991, FPC filed its petition with the Commission, in Docket No. 911142-EQ, for Commission authority to refuse all standard offer contracts *except* the one signed by Panda. The earlier petition for authority to reject and the subsequent petition for authority to refuse all contracts except the one signed by Panda were combined into a single docket, Docket No. 911142-EQ.

In its Order issued October 22, 1992 in that latter docket, this Commission ordered that FPC's petition for authority to reject all standard offer contracts except that signed by Panda be granted and that the docket be closed. True and correct copies of that Order is attached hereto and incorporated herein as *Exhibit A*.

A true and correct copy of the power purchase agreement, or contract, between FPC and Panda, executed by Panda on October 4, 1991 and executed by FPC on

---

(. . . continued)

used for convenience because, apparently, the Commission's staff attaches some significance to the terms.

November 25, 1991 is attached hereto and incorporated herein as *Exhibit B*.

B. After the Commission's approval of the Panda contract, Panda and FPC commenced performing that contract, from the Fall of 1992 until recently, almost two and one-half years. However, unbeknownst to Panda, in early 1994 FPC completed an internal study of its cogeneration contracts and, adopted internally, a strategy[2] to rid itself of those contracts or to force the cogenerators into negotiating different terms of the contracts, more to FPC's liking. In the Fall of 1994, FPC concocted claims that Panda, now, is not "eligible" under the contract and that Panda is not entitled to receive capacity payments for the term of the contract, as approved by this Commission.

C. Then, on January 25, 1995, FPC filed a Petition for Declaratory Statement with this Commission, claiming that the contract being performed by Panda and FPC, and executed effective November 25, 1991 is " . . . *not available* to Panda-Kathleen, L.P. ("Panda") *if* it constructs a facility configuration, as it currently proposes to do, with the capacity to produce 115 megawatts ("MW")." In addition, even if the contract is "available" to Panda, FPC seeks a further Commission decision that it has no obligation to make capacity or energy payments under the contract after December, 2016. A true and correct copy of the FPC Petition for Declaratory Statement, with exhibits, is attached hereto as *Exhibit C*.

Although these claimed "issues" of (1) availability of the contract to Panda and (2) term of capacity and energy payments were discussed and fully resolved between Panda and FPC early on, long before FPC filed its January 25, 1995 petition, it is evident that FPC is seeking the Commission's assistance in "revisiting" the previously-approved contract with the intent that the Commission enter orders which, in effect, will render the contract terminated or economically unfeasible, thereby preventing Panda from

---

[2] Entitled "Cogeneration and Purchased Power Strategic Proposal".

concluding the financing, construction and operation of its QF near Lakeland, Florida - and putting Panda out of business.

D. The petition of FPC was and is a sham pleading, designed to institute this proceeding for the sole purpose of excluding Panda from the market in the sale and purchase of wholesale electric power in FPC's geographical service area. In addition, FPC, later in 1985 interfered with business and contractual relationships between Panda and third parties, in order to disable Panda from obtaining sufficient natural gas transport capacity to the construction site. The practical effect of FPC's deliberate actions, were designed to cause Panda's investors and lenders (the Bank of Tokyo and Merrill Lynch) to decline to close the financing of the QF earlier this year, and thereby prevent Panda from financing and constructing the facility near Lakeland.

E. Necessarily, Panda was required to protect itself at this Commission and to seek proper judicial relief in the court. On June 26, 1995 Panda filed its complaint in the District Court for the Middle District of Florida, Tampa Division, alleging antitrust violations and seeking necessary remedies, including injunctive relief and damages. That suit (Cause No. 95-992-Civ-T-24(c), *Panda-Kathleen, L.P. v. Florida Power Corporation,* hereinafter, for convenience, "the Federal case") is now pending and discovery by the parties has commenced. Upon the conclusion of a first round of document and deposition discovery by the parties, the court in the Federal case will conduct, later this year, a hearing on Panda's motion for preliminary injunction.

Further, to procedurally protect its position (even though this Commission lacks jurisdiction over FPC's petition and the proceeding instituted thereby), Panda filed in this Commission its petition to intervene on February 6, 1995 and its Motion for Declaratory Statement and Other Relief on March 14, 1995. The settled law is that no pleading of any party can confer jurisdiction on a court or agency which lacks that jurisdiction; a fatal defect which

may be raised by the parties or the court or agency at any time.

F. On August 10 and 11, 1995 this Commission filed its initial and first amended motion to intervene in the Federal case, seeking to intervene as a party in the Federal case, claiming it wanted its "position" to be known to the court: that the Commission fully intended to claim it had jurisdiction to consider and potentially grant the relief sought in FPC's January 25 petition. The Commission assumed and has aggressively asserted that it has the jurisdiction to do so.

G. Because it was and is clear that the proper forum with jurisdiction to determine the anticompetitive conduct and other wrongful conduct of FPC and granting the relief sought by Panda is the court in the Federal case, Panda assumed that the Commission and its staff would acknowledge that the misconduct of FPC should be adjudicated in the Federal case. To that end, Panda's counsel recently requested of the Commission staff attorney to recommend to the Commission that this proceeding be stayed or abated so that the court in the Federal case could proceed to resolve all issues in dispute between Panda and FPC, given that court's jurisdiction, and the doctrine of comity. The staff attorney refused. FPC's counsel assigned to this proceeding refused.

The Commission also proceeded to file its second amended motion to intervene in the Federal case. Further, the Commission staff has stated the intention of the Commission to proceed with a September 14, 1995 hearing on designation of issues in this proceeding.

In the meantime, on September 6, 1995 FPC has served upon Panda's counsel FPC's Notice of Taking of Oral Depositions of Panda employees and officers, commencing September 18, 1995. Not without coincidence, the FPC's counsel in this proceeding also served notice to depose the same Panda witnesses on the same dates.

In short, notwithstanding the applicable jurisdictional law which precludes the Commission from proceeding down the course the Commission has set for itself in this proceeding, the Commission apparently has no intention of acknowledging that jurisdictional law. Accordingly, these Motions to Stay or Abate and to Dismiss must now be presented to the Commission.

II. ARGUMENT

A. The Commission Does Not Have Jurisdiction Over Panda

It is well established that the Commission is a legislative agency with only those powers explicitly conferred by statute or reasonably implied from the statutory powers which have been explicitly granted. *United Telephone Co. v. Public Service Commission,* 496 So. 2d 116, 118 (Fla. 1986). Any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it. *Id.,* 496 So. 2d at 118, quoting the Florida Supreme Court in *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.,* 170 So. 2d 577, 584 (Fla. 1965). Absent express authority, or authority necessarily implied, the Commission is not concerned with allegations of fraud or breach of contract between and among contracting parties. *Deltona Corporation v. Mavo,* 342 So. 2d 510, 512 (Fla. 1997).

The statutory scheme applicable here is found in Chapter 366, F.S., and grants the Commission jurisdiction over "public utilities" and "electric utilities" as defined in Sections 366.02(1) and (2), F.S. Section 366.02(1), F.S., defines "public utility" as "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity . . . to or for the public within this state." Section 366.02(2), F.S., defines "electric utility" as "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state."

Panda is not a public utility or an electric utility. Panda is a qualifying facility ("QF") pursuant to the provision of the Public Utilities Regulatory Policies Act ("PURPA"), the Federal Rules implementing PURPA found in 18 C.F.R. 292.201, *et. seq.*, and Commission Rule 25-17.080(1), (3), F.A.C. Panda sells electric capacity and energy at *wholesale* to FPC pursuant to the contract entered into in November, 1991. Panda does not engage in retail electricity sales of any type and, therefore, does not fall within the definition of either "public utility" or "electric utility" in Sections 366.02(1) and (2), F.S. The Commission does not have jurisdiction over Panda.

B. <u>The Commission Does Not Have Jurisdiction Over the Claims Asserted in the FPC Petition</u>

1. Section 366.051, Florida Statutes, Does Not Grant the Commission Jurisdiction to Resolve Any Contract Dispute Between FPC and Panda.

The only authority which the Commission exercises over QFs such as Panda is purely derivative. The Commission oversees and regulates utilities such as FPC, who, in turn, contract with QFs such as Panda. Utilities petition the Commission for approval of their contracts[3] with QFs in order to recoup from ratepayers the money the utilities pay the QFs under these contracts.

In connection with that approval process, Section 366.051, F.S., authorized the Commission to do two things: (1) "establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers" and, at the Commission's discretion, and (2) "set rates at which a public utility must purchase power or energy from a cogenerator or small

---

[3] In reality, FPC wrote the contract and the tariff and the Commission approves both, as here, in 1991. Further, the Commission approved the FPC-Panda contract in another order on October 22, 1992.

power purchaser." At that point, the Commission's obligations - and authority - are finished.

Indeed, this Commission's staff recently recommended, in its January 26, 1995 memorandum to the Director, Division of Records and Reporting, that a Motion to Dismiss (in Docket No. 940357-EQ - Petition for Resolution of Cogeneration Contract Dispute with Orlando Cogen Limited, L.P., by Florida Power Company) be granted. A true and correct copy of the staff Memorandum to the Division of Legal Services is attached hereto and incorporated herein as *Exhibit D*. This Commission followed the staff's recommendation and ordered that the FPC petition involving that contract dispute be dismissed. *See,* the Commission's February 15, 1995 decision and order in the consolidated cases, Docket No. 94-0771-EQ, a true and correct copy of which is attached hereto and incorporated herein as *Exhibit E*.

Both the Commission's staff and the Commission itself acknowledged that the Commission's jurisdiction and authority is dependent upon the enabling statute itself, here, Section 366.051 of the Florida Statutes. The Commission staff stated:

> "In compliance with PURPA, Section 366.051, F.S., provides that Florida's electric utilities must purchase electricity offered for sale by QFs, 'in accordance with applicable law.' The statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. *The statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs* . . . .
>
> This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations carve out a *limited role for the states in the regulation of the*

> *relationship of utilities and the qualifying facilities*. . . . As Mr. Wenner from Auburndale pointed out in oral argument in a related docket, PURPA and FERC's regulations are not designed to open the door to state regulation of what would otherwise be a *wholesale power transaction*." (emphasis added).

The staff cited *Docket No. 840438-EI, in re: Petition of Tampa Electric Company for Declaratory Statement Regarding Conserve Cogeneration Agreement*, Order No. 14207, issued March 31, 1985, wherein the Commission refused to construe a paragraph of the cogeneration agreement, stating:

> "In response to Conserve's jurisdictional arguments, we agree that *the civil courts have exclusive jurisdiction to construe the agreement and award damages if any are merited*." Order 14207 at page 4. (emphasis added).

As stated by the Commission staff in its memorandum, Exhibit E:

> "The Commission said [in the *Conserve* Order] that it did have jurisdiction to interpret its cogeneration rules and to decide that its new rules did not apply to preexisting contracts, but it stated that *matters of contractual interpretation were properly left to the civil courts*."

The weight of authority from other states that have addresse[d] similar issues supports this position. *See, e.g., Afton Energy, Inc. v. Idaho Power Co.*, 729 P.2d 400 (Id. 1986); *Bates Fabrics, Inc. v. PUC*, 447 A.2d 1211 (ME. 1992); *Barasch v. Pennsylvania Public Utility Commission*, 546 A.2d 1296, *reargument denied*, 550 A.2d 257 (1988); *Erie Associates - Petition for a Declaratory Ruling that Its Power Purchase Contract with New York State Electric and Gas Corporation Remains in Effect*, Case 92-E-0032, N.Y. PUC LEXIS 52 (March 4, 1992); *Freehold Cogeneration Associates v. Board of Regulatory Commissions of the State*

of New Jersey, 1995 WL 4897 (3rd Cir. (N.J. 1995); *Fulton Cogeneration Associates v. Niagara Mohawk Power Corporation,* Case No. 92-CV-14112 (N.D.N.Y. 1993). The facts vary in these cases, but the principle is same; under federal and state regulations of the relationship between utilities and cogenerators, state commissions should not resolve contractual disputes over the interpretation of negotiated power purchase agreements once they have been established and approved for cost recovery.

In *Afton, supra.*, Idaho Power Company (Idaho Power) and Afton Energy, Inc. (Afton) had negotiated a power purchase agreement that included two payment options for the purchase of firm energy and capacity. The options were conditions on the Idaho Supreme Court's determination whether the Idaho Commission had authority to order Idaho Power to negotiate an agreement with Afton or dictate terms and conditions of the agreement. When the Supreme Court made its decision, Idaho Power petitioned the Commission to declare that the lesser payment option would be in effect. The Commission, dismissed the petition, holding that the petition was a request for an interpretation of the contract and that the district court was the proper forum to interpret contracts. The Idaho Supreme Court upheld the Commission's decision.

In *Erie Associates, supra.*, The New York Public Service Commission was asked by the cogenerator to declare that its negotiated purchased power agreement was still in effect even though the utility had canceled the contract because the cogenerator had failed to post a deposit on time. The Commission stated, at page 127:

> Erie's petition will not be granted. Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end.

> We will not generally arbitrate disputes between utilities and developers over the meaning of contract terms, because such question[s] do not involve our authority, under PURPA and PSL66-c, to order utilities to enter into contracts. Requests to arbitrate disputes are simply beyond our jurisdiction, in most cases.
>
> . . . Erie has not justified a departure from the policy of declining to decide breach of contract questions, or identified a source of the authority to exercise jurisdiction over such issues.

The Commission staff also cites in the Memorandum, with approval, the decision of the Florida Supreme Court in *United Telephone Company, supra*. The Commission staff stated:

> "The Commission's authority derives from the statutes. *United Telephone Company* (citation) It *cannot be conferred or inferred from the provisions of a contract*. Nor does the Commission's responsibility to ensure the reliability of Florida's electric grid impose a responsibility to interpret the backup fuel provision of this contract. *Even if the Commission determined that Orlando Cogen had not complied with the provisions of the contract, it could not order the cogenerator to perform*. When the Commission approved this contract for cost recovery purposes, it determined that FPC's ratepayers would be protected in the event the cogenerator defaulted. *Any further remedy for breach of the contract itself lies with the Court*. . . . Staff recommends that the Motion to Dismiss should be granted. Florida Power Corporation's Petition fails to set forth any claim that the Commission can resolve. *The Commission should defer to the Court to resolve this contract dispute*. FPC's Petition

should be dismissed." Memorandum at pages 9-10.

In sum, Section 366.051, F.S. does not give the Commission express or implied jurisdiction over the resolution of cogeneration contract disputes, as the Commission's staff has acknowledged. Strangely, in this case, the staff has taken an entirely contrary position.

2. Federal law preempts the Commission from exercising jurisdiction to revisit a previously-approved cogeneration contract.

It is undisputed that the Commission has approved the contract itself (and the rate tariff), in its order in Docket No. 910004-EU, Order No. 24989 issued August 29, 1991. It is undisputed, by the way, that the testimony offered by FPC witnesses (*e.g.*, Robert D. Dolan) in that proceeding established that FPC wrote both the contract and the tariff applicable to Panda and FPC; presented the contract and the tariff to the Commission in the form of exhibits in that proceeding; and the contract and tariff, with minor modifications, were approved by the Commission in its final order in that proceeding.

In addition, the specific, signed contract for a 30-year term between Panda and FPC was especially approved by this Commission in its October 22, 1992 Order, (Exhibit A). Under settled case authority, this Commission cannot, some three years later (or at any subsequent time), revisit that contract for the purpose of construing, interpreting, modifying, canceling, voiding (or, for that matter, enforcing) the contract.

The point of departure is the provisions of PURPA § 210, 16 USC § 824a-3. The pertinent portion of that section, *according to this Commission* in its February 15, 1995 Order, Docket No. 940771-EQ, (Exhibit E):

> "contains several provisions designed to overcome [the] obstacles" [the resistance of monopoly electric utilities to purchasing power from other generation suppliers; the potential refusal of monopoly electric utilities

> to sell needed backup power to cogenerators; and subjecting cogenerators to extensive and expensive federal and state regulations]. § 210(a) directs the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage the development of alternative sources of power, including rules that require utilities to offer to buy power from and sell power to qualifying cogeneration and small power production facilities (QFs). § 210(b) directs FERC to set rates for the purchase of power from QFs . . . . FERC's regulations implementing PURPA require utilities to purchase QF power at a price equal to the utility's full avoided cost (defined under 18 C.F.R. § 292.101(b)(6)) *FERC's rules also contain a provision that permits utilities and QFs to negotiate different provisions of power purchase agreements, including price, as long as they are at or below a utility's avoided cost. (18 C.F.R. § 293.301)* In compliance with PURPA, § 366.051, Florida Statutes, provides that Florida's electric utilities must purchase utility offered for sale by QFs, "in accordance with applicable law." The Statute directs the Commission to establish guidelines relating to the purchase of power or energy from QFs, and it permits the Commission to set rates at which a public utility must purchase that power or energy. *The Statute does not explicitly grant the Commission the authority to resolve contract disputes between utilities and QFs."* (emphasis added).

Under the Supremacy Clause of the U.S. Constitution, applied to the field of cogeneration, such reconsideration by state commissions have the effect of conflicting with federal law in interfering with and discouraging cogeneration, by imposing burdensome utility-like regulation upon cogenerators, contrary to PURPA and FERC's regulations, in a field that is preempted by the federal law. Commission actions in a proceeding such as

this one interfere with that federal policy and simply must yield.

In *Smith Cogeneration Management, Inc. v. The Corporation Commission of Oklahoma,* 863 P.2d, 1227 (Okla. 1993), the Oklahoma Commission had adopted a rule which allowed reconsideration by the Commission of avoided costs after the contract was agreed upon, thereby creating uncertainty for the cogenerator in its ability to obtain *necessary financing* to develop the facility. The Oklahoma Supreme Court held that the Commission rule was unlawful, being preempted by federal law and contrary to PURPA and the regulations of FERC. The Court pointed out that the preemption doctrine stems from the Supremacy Clause of the U.S. Constitution and invalidates any state law or regulation which contradicts or interferes with an act of Congress. The Court held that once the cogenerator had *contractually* obligated itself to deliver power to the public utility, the contract was approved and *could not be revisited* by the Commission at a later time. The Court relied upon *FERC v. Mississippi,* 456 US 742, 745 (1982), in which the U.S. Supreme Court held that the federal government may constitutionally order the States to implement the FERC's regulations through the State courts or agencies. As the Oklahoma Supreme Court stated:

> "Under this federal command, states have the authority to promulgate regulations *mirroring* the Federal regulations. In general, a State may enact its own laws or regulations as long as the federal authority has not preempted all state efforts to regulate in the area *and* as long as the state laws or regulations do not conflict with federal laws or regulations. *City of New York v. FCC,* 486 U.S. 57, 64 (1988).

The Court held that the State Commission rule directly conflicts with PURPA and FERC regulations; it discourages cogeneration, and that is preempted by Federal law. The Court pointed out that if the entrepreneur can show an inability to finance without a firm contract, it is even more clear that any attempt by the Commission to revisit a cogeneration contract, *even as a result of changed*

circumstances, deprives the cogenerator of the benefits of the commitment it made to furnish the power, and the State Commission rule is invalid.

The Court further held that a cogenerator is entitled to negotiate a long term purchase contract with established full avoided costs even if those costs are based on future estimates. The Court cited its 1993 opinion in *Wilson v. Harlow,* 860 P.2d 793, 799 (1993) in holding that cogeneration regulations might require results which are unfavorable to a utility's ratepayer. Just because conditions change and render a power sales agreement no longer attractive or feasible is not justification for revisiting or otherwise modifying the contract.

The Court also held that FERC regulations grant cogenerators the right to negotiate a long-term purchase contract, with the price of power to be purchased based on the avoided costs of the utility *calculated at the time of delivery or at the time the obligation is incurred.* Should a cogenerator choose the latter method of calculation, it has the right to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility.

The Court stated:

> "Reconsideration of long term contracts with established estimated avoided costs *imposes utility-type regulation over QFs. PURPA and FERC regulations seek to prevent reconsideration of such contracts.* The legislative history behind PURPA confirms that Congress did not intend to impose traditional utility-type ratemaking concepts on sales by QFs to utilities." See also *Wilson v. Harlow,* 860 P2d 793 (S.Ct. of Oklahoma, 1993).

In *FERC v. Mississippi,* the Supreme Court interpreted PURPA as imposing requirements on State regulatory authorities *in excess* of their duties under State law. The Court stated that, through PURPA, the Federal government intend to use State regulatory machinery to

advance federal goals. The Court held constitutional the requirement of PURPA § 210 which "*has the States enforce standards promulgated by FERC.*" Sd., 102 S. Ct. At 2137. The legislative history of the intention of the House and Senate conferees is consistent with the Court's opinion. See 1978 US Code Congr. and Adm. News 7659,7801.

The *Smith* decision of the Oklahoma Supreme Court was cited with approval in the *Freehold* decision this year by the Third Circuit, *infra*.

The thrust of these cases is that Federal law has preempted state PUC proceedings which seek to impose state utility regulation on QFs by construing previously approved PPAs or engaging in similar regulatory activity.

In *Independent Energy Producers Ass'n v. California PUC,* 36 F.3d 848 (9th Cir. 1994), the Court cited the Supreme Court's decision in *American Paper Inst. v. American Elec. Power,* 461 U.S. 402, 412-18, 103 S.Ct. 1921, 1927-31 (1983) as upholding FERC's requirement that QFs receive full avoided cost rates, the statutory maximum under PURPA § 210.

The Ninth Circuit refers to four types of standard offer contracts adopted by the California PUC; however, lawfulness of the contracts was not an issue in the case in either the trial or appellate court.

It is clear that, whether a contract later proves to be undesirable to the utility or not, once the contract has been signed neither the utility nor the state PUC can change or modify the contract. *That includes "standard offer" or fixed-price contracts, the precise subject before the Ninth Circuit Court*. In *Independent Energy*, the PUC's "monitoring and enforcement program" over those "standard offer" contracts, authorizing utilities to monitor QFs compliance with *federal* operating and efficiency standards (and to reduce payments to QFs not found to be in compliance) was struck down, as preempted by federal law. Clearly the holding applies here, particularly since FPC is not even asking this Commission to ascertain anything about federal law.

The Court also relied upon 45 Fed. Reg. 12214, 12226 (1980), pointing out that FERC § 292.304(e)(2)(iii) ". . . recognizes that the value of electric energy provided by the QF varies depending on the *terms of its commitment to the utility, the length of time* during which the QF has guaranteed that it will supply electric energy to the utility, . . ." *Id.* 36 F.3d at 856-57. Thus, the term of the contract and its provisions for payments are matters preempted by the FERC regulations; yet, FPC is attempting to ask this Commission to delve into the same subject.

As to an attempt to alter the terms of an *existing* contract, the Court held that the PUC did not have the authority to alter the contract:

> "However, the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the *state and the Utilities* the right unilaterally to modify the terms of the standard offer contract. Federal regulations provided that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed. 18 C.F.R. § 292.304(d)(2)." *Id.* 36 F.3d at 858.

The Supreme Court of Texas also agrees. In *PUC v. Gulf States Utilities Company*, 809 S.W. 2d 201 (S.Ct. 1991), the Court held that PURPA does not grant the Texas PUC authority to alter the terms of a power purchase contract.

In the very recent Third Circuit case, *Freehold Cogeneration v. Board of Reg. Com'rs. Of N.J.*, 44 F.3d 1178 (3rd Cir. 1995) [decided on January 9, 1995, prior to FPC's January 25 Petition filed in this Commission], the PPA was negotiated, signed and then approved by the New Jersey Board (PUC). However, the Board decided in 1993 to let utilities out of QF contracts no longer beneficial to the utilities, by buyouts and other measure to reduce power costs. In early 1994, the Board directed the QF and the utility to negotiate lower contract rates or a buyout and, if they did not do so, the Board would commence an

evidentiary hearing to consider various courses of action including modifying or revocation of its approval of the PPA. *The QF filed suit in the Federal court, seeking a declaratory judgment that PURPA preempted the Board's order and an injunction to stop the order.* The District Court declined jurisdiction under PURPA § 210(g) (only state courts or FERC are to review state PUC orders) and the Johnson Act, 28 U.S.C. § 1342 (which curtails federal court jurisdiction over state utility rates).

However, the Circuit Court reversed, holding:

1. The appeals to state courts or FERC under PURPA § 210(g) are to *review* state PUC proceedings "designed to implement any requirement of rules promulgated by the FERC pursuant to 210(a)" but, here, the QF was claiming that the Board proceeding was inconsistent with and preempted by PURPA § 210(e) and the FERC regulations which *exempt QFS from state utility regulation* (16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c)). *Id.* at 1184-85 (*citing Bristol Energy v. N.H. PUC*, 13 F.3d 471 (1st Cir. 1994). The Court rejected the application of § 210(g).

2. The Johnson Act does not apply because the QFs claim is based on a federal statute, PURPA, and not solely on the Federal Constitution, *citing Arkansas P&L Co. v. Missouri PUC,* 829 F.2d 1444, 1449 (8th Cir. 1987).

3. The Federal court has jurisdiction over the preemption claim even though the parties were still in ongoing proceedings at the Board.

4. The state Board's implementation of FERC's § 210(a)-type regulation *ended when the Board approved the PPA.* The attempt to either modify the PPA or revoke Board approval is "utility-type" regulation from which the QF is immune under PURPA § 210(e). PURPA bars reconsideration of the prior approval of the PPA, the Court citing *Independent, supra,* and *Smith Cogeneration, supra,* "The Oklahoma court (in *Smith*) did not rest its preemption holding merely on the impact of the Commission rule on

financing, *but primarily on the obligation and rights of the parties under a negotiated and executed contract.*" *Id.* at 1193.

Here, FPC, too, is attempting to get the Commission to terminate or modify Panda's PPA because its rates are higher than rates that might be paid today. FPC decided in 1993 that it had contracted for too much QF power, which it claimed might result in a minimum load problem during certain periods. Rather than honor its QF contracts by reducing the amounts of its own power generation or by selling excess power to others at a reduced price, [as this Commission clearly stated should be done, in the January 1991 Order when FPC signed up over 642 MW for an identified need of 450 MW], recently has been attempting to cure its claimed minimum loan problem by either coercing supply and price concessions from QFs (as in the Orlando Cogen case and several other QFs) or, as here, to entirely get out of the contract with Panda.

In FPC's cogeneration strategy documents of March, 1994, FPC concluded that its strategic interests will be served by taking whatever steps are necessary to rid itself of all of [its] cogeneration contracts, including the Panda contract. In some cases, FPC has bee able to intimidate cogenerators to renegotiate their contracts for lower capacity and energy payments by FPC, for curtailment or both. Four cogens who have resisted that intimidation, including Panda, have filed suit in the federal or state courts. The simple facts are that FPC made errors in calculating its cogeneration capacity needs in 1990 and 1991; FPC made errors in estimating the relative costs of coal and natural gas as fuels; and FPC decided it wanted to accelerate the construction and operation of its Fort Meade, Polk County units, without any competitive interference from Panda. In its "Cogen strategy" documents, FPC repeatedly made it clear that its fundamental purpose in adopting its strategy to rid itself of the cogen contracts is to "improve its competitive position". Its subsidiary motive is to avoid making capacity and energy payments to the cogenerators as contracted.

That motive cannot be countenanced under PURPA and the FERC regulations. That is, FPC cannot attempt to obtain from this Commission an order which would relief FPC of its PURPA and FERC obligations to buy and sell power to and from QFs at the rates established in the contracts. Thus, in *Afton Energy, Inc. v. Idaho Power Company,* 693 P.2d 427 (Supreme Court of Idaho, 1984), the public utility attempted to challenge the authority of the Idaho PUC to order the utility to enter into a long-term (35 year) contract with the cogenerator. Idaho Power argued that the PUC should approve a contract which provided that the rates, terms and conditions in the contract are subject to the continuing jurisdiction of the Idaho PUC and, therefore, are subject to change, in revisions by order of the PUC. The basis of Idaho Power's claim was that the PUC had the (usual) statutory requirement under Idaho law to determine just, reasonable and sufficient rates, which rates of necessity must be subject to change as conditions change. The Idaho Supreme Court rejected that argument. The Court pointed out that PURPA section 210(b) (providing that the rules prescribed in subsection (a) shall insure that the utility's rates or purchase of energy from a QF should be just and reasonable "to the electric consumers of the electric utility and in the public interest") does *not* permit the State Commission to exercise pervasive regulation over the avoided cost rates paid to the cogenerator. "That is, the conferees of the House and Senate expressly stated that it was not their intention that that language in § 210(b) would subject cogenerators to State commission examination of the rates or terms; to do so would discourage cogeneration." The language proposed by Idaho Power, the Court said, would result in utility-type regulation over the cogenerators, a result clearly rejected by Congress when it enacted PURPA.

Just as in the *Independent Energy* and *Freehold* cases, *supra*, the Court in *Afton Energy* pointed out that the FERC regulations do not contemplate utility-type regulation over rates paid to the cogenerator. The Court held that FERC regulations § 292.304(b), (5) and (d) make it clear that if the cogenerator chooses to exercise its option to receive avoided costs calculated at the time the obligation is incurred, *that rate is to be maintained for the duration of*

the contract. Thus, the Court rejected Idaho Power's argument, stating:

> "It is clear that both the Congress and FERC, through it's implementing regulations, intended that (cogenerators) should not be subjected to the pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the Commission. In fact, one of Congress' main objectives in enacting PURPA was to encourage cogeneration and small power production by exempting (cogenerators) from pervasive state rate regulation. Congress was aware that such regulation presented a strong disincentive for cogenerators to engage in power production where the financial risks were great and the returns were not guaranteed to be recoverable."

The Idaho Supreme Court also made it clear that FERC Rule § 292.304(e)(iii) " . . . which provides that one of the factors in determining the avoided cost rates to be paid the (cogenerator) is "the terms of any contract or other legally enforceable obligation, *including the duration* of the obligation . . ." The Court went on to say that "the level of payments to the (cogenerator) varies depending on the length of the contract. *Mathematically, the rate level is a function of the term of the contract.* Thus, the Commission's rate-making authority is intricately related to its ability to define the term of the obligation. See Appendix A." *Id.*, 693 P.2d at 431-432 and footnote 8. Also, see Appendix A, Idaho Power's rate schedule for contracts from 2 years to 35 years in duration. [Obviously, the 20 year vs. 30 year dispute in the Panda case is derived from documents created by FPC, not from any authority or permission derived from PURPA or the FERC regulations. The is *no term limitation* in the federal law and FPC's claim is unsupportable under federal law - and commonsense. The Idaho PUC had set out in its rules the terms of a standard form contract and, in justifying its refusal to sign that contract, Idaho Power asserted that the Commission had no jurisdiction to order Idaho Power to

sign a contract which was not freely negotiated but rather was a standard form contract with terms dictated by the Commission.

The Commission also agreed that Idaho Power was, in fact, correct in its assertion that *the Commission lacked jurisdiction to dictate contract terms between a utility and a cogenerator*. The Idaho Commission stated: "The role of standard form contracts was to serve as a *solid point of departure for negotiations*. It has been our experience that sponsors of projects are greatly assisted in their initial planning efforts and their dealings with potential financial backers if the rates, terms and conditions governing future relations with the purchasing utility can be made available at the outset with at least some degree of assurance. It makes no sense to reinvent the wheel with each project. Nonetheless, *the parties remain free to negotiate* whatever terms make sense in light of the unique circumstances of each site's specific application."

In discussing this issue, the Idaho Supreme Court and the United States Supreme Court in the *FERC v. Mississippi* decision, *supra*, discussed FERC Rule 18 C.F.R. § 292.401(a)(198), which states that state commissions may implement PURPA § 210's requirement that a state commission implement rules for each electric utility, quoting that FERC Rule as authorizing a state commission to implement the *federal law* by, among other things, "an undertaking to resolve disputes between qualifying facilities and electric utilities arising under [PURPA]." In *FERC v. Mississippi*, the Supreme Court said:

> "In essence then, the [federal] statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes *arising under the statute* . . . . [T]he Mississippi Commission has jurisdiction to *entertain claims analogous to those granted by PURPA*, and it can satisfy § 210's requirement simply by opening its doors to claimants. That the Commission has administrative as well a judicial duties is of no significance. Any other conclusion would

> allow the States to disregard both the *pre-imminent position held by federal law* throughout the Nation . . . and the Congressional determination that the *federal rights granted by PURPA can appropriately be enforced through State adjudicatory machinery* . . ." *Id.*, 102 S.Ct. at 2137-38.

However, the unequivocal significance of the opinions of the Supreme Court and the Idaho Court is that a state commission only has the authority to resolve disputes *under the federal law*. Here, FPC is *not* seeking a resolution of *any* dispute under *federal law*, but only asserts (frivolous) claims under a contract and a tariff FPC itself filed with and obtained previous approval by . . . this Commission or, at worst, under Florida Administrative Code Rule 25-17.0832(3). Both the Supreme Court and the Idaho Supreme Court confirmed the authority of a state commission to order a public utility to enter into a power purchase contract with a cogenerator, as a necessary part of that State Commission's duty to carry out the requirements of PURPA and the FERC regulations. However, the *Independent Energy, Freehold, Afton Energy* and *FERC v. Mississippi* decisions prohibit subsequent Commission hearings which may alter or terminate the PPA.

In *Kansas City Power & Light Co. v. The State Corporation Commission of Kansas*, 676 P.2d 764 (S.Ct. of Kansas, 1984) the Kansas Supreme Court reversed the Kansas Commission's setting of rates to be charged to the cogenerator on a basis other than avoided cost. The Court stated:

> "We find that *federal law has preempted the field in the area of cogeneration,* and that the KCC, a state regulatory authority, cannot require KCPL (the utility) to purchase electricity from cogenerators at a rate greater than the federally regulated rate based on avoided cost. The Congress of the United States established a national policy of developing alternate energy sources to combat the national energy crisis. The federal government has under its supervision

> activities in the energy field, including cogeneration, designed to benefit the nation as a whole. *Where a state regulatory authority acts to the contrary, it must fail.* The requirements of PURPA and the FERC regulations *preclude and preempt state action not in compliance therewith unless a waiver is obtained.* (referring to the waiver provision, which the Kansas Commission did not exercise, in FERC Rule § 292.403).

Likewise, the Appellate Division of the Supreme Court of New York has held, without equivocation, that PURPA and the federal regulations have preempted the area of cogeneration and that New York PUC's rules and regulations cannot lawfully depart from the federal law. *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, et al.*, 98 App.Div.2d 377, 471 N.Y.S.2d 684 (1983).

3. The Commission's purported distinction between a "negotiated" and a "standard offer" contract is a distinction without a difference under the applicable law.

It is suggested by the Commission staff in its Memorandum, Exhibit D and in the Commission's February 15, 1995 Order, Exhibit E, that the Commission's rule, Section 25-17.0832, makes significant distinctions between "negotiated" contracts, on the one hand, and "standard offer" contracts, on the other hand. Apparently, the argument is that, although the Commission has decided it does not have any authority to resolve contract disputes under negotiated contracts, between "big" QFs and a public utility, the Commission does have such authority over "standard offer" contracts between "small" QFs and a public utility. Whatever those distinctions may be, they have *nothing* to do with jurisdiction; both contracts have the

same purpose under federal law and neither can be revisited later. That distinction has no authority under law, which controls. There is *no* case authority, or federal statutory law, which supports the jurisdictional claim of the Commission or its staff.

Further, the Commission's own rules, *e.g.*, Section 25-17.0832(1) and (2), clearly require the Commission to do more work and exercise greater supervision over a negotiated contract than over a standard offer contract in Rule 25-17.0832(3). In its February 15 Order, Exhibit E, the Commission acknowledges that it must evaluate a negotiated contract to determine whether the contract is prudent for cost recovery purposes, i.e., " . . .to determine if its rates, terms and other conditions can be expected to contribute toward the deferral or avoidance of additional capacity construction by the utility . . ." Order at page 4. Again, in subsection (2) of that Rule, dealing with negotiated contracts, the Rules states "Negotiated contracts shall not be evaluated against an avoided unit in a standard offer contract, thus preserving the standard offer for *small qualifying facilities* as described in subsection (3)." Supposedly, the negotiated contract would be between "larger" private power companies which may want to negotiate special terms, conditions and even prices with the public utility; whereas the standard offer contract would be reserved for "small qualifying facilities" where most of the work of negotiating the terms, conditions and prices was already done by the public utility in writing the contract and the associated rate tariff, a contract and tariff subsequently evaluated and approved by the Commission itself.

Clearly, whether the Commission played a great or lesser role in crafting one contract can have nothing to do with the commission' slack of jurisdiction to revisit one of those contracts, already executed by the parties, partially

performed by the parties and approved (twice) by the Commission.

Further, at page 6 of the February 15 Order (Exhibit E), the Commission stated:

> "This rather lengthy discussion of the statutes and regulations demonstrates that PURPA and FERC's regulations *carve out a limited role for the States in the regulation of the relationship between utilities and qualifying facilities*. States and their utility Commissions are directed to encourage cogeneration, provide a means by which cogenerators can sell power to utilities *under a State-controlled contract if they are unable to negotiate a power purchase agreement,* encourage the negotiation process, and review and approve the terms of negotiated contracts for cost recovery from the utilities' rate payers. *That limited role does not encompass continuing control over the fruits of the negotiation process once it has been successful and the contracts have been approved.* ... While the Commission controls the provisions of standard offer contracts, we do not exercise similar control over the provisions of negotiated contracts."

The Commission is quite correct in acknowledging its very limited authority to interfere in the relationship between utilities and QFs. The Commission, however, is clearly wrong when it asserts that it has the authority to "control the provisions of standard offer contracts", after they have been approved, whereas it lacks control over negotiated contracts after they have been approved. This is a distinction without a difference. Clearly, the Commission

already has "approved" the standard offer contract, first, by allowing FPC's contract and tariff to be filed and become effective with all of its detailed terms and provisions to be embodied in that contract; and, second, by entering an order granting FPC's petition to refuse all standard offer contracts except that one submitted by Panda, in its order of October 22, 1992. Obviously, Panda's contract was just as "approved" as any negotiated contract - indeed, it was approved twice. The Commission went to a great deal more trouble with, and analysis of, the terms of so-called "negotiated" contracts in approving approximately eight (8) contracts in its order of July 1, 1991 in Docket No. 910401-EQ, where the Commission reviewed and analyzed each of the principle terms of those contracts. Did the Commission do *less* on the standard offer contract, which it says it "controls"? Obviously not.

Further, the Commission cannot point to any valid *post*-approval distinction between "large" cogenerators or QFs and "small" cogenerators of QFs. Panda's standard offer contract provides for the construction of a facility which will contractually guarantee to produce 74.9 MW (committed capacity, not rated capacity) and, whether the plant necessary to do that is rated at 80 MW or at 150 MW is of no concern of the Commission. Further, in the Commission's July, 1991 Order, which approved a number of "negotiated" contracts, the "committed capacity" of those facilities ranged from a low of 28 MW to a high of 103.8 MW - and *five* of the eight facilities had "committed capacity" only between 28 MW and 72 MW. What is "small" and what is "large"?

It should be noted that in Florida Rule 25-17.080(1), the Commission *adopted* FERC Rules 292.101 through 292.207, which include Rule 292.205, the criteria for qualifying cogeneration facilities. The same Florida Rule,

at subparagraph (3), restates or summarizes the FERC qualifying criteria for a cogenerator facility. *Both* the FERC Rule and the Florida Rule incorporating the FERC Rules are in conflict with the "large" and "small" distinction between facilities under a negotiated contract and facilities under a standard offer contract, the "less than 75 MW definition of" small QFs in Florida Rule 25-17.0832(3), at 3(a) and 3(c). There also is a conflict between the Florida Rules' use of "committed capacity" in subparagraph (e)2 and the definitions in FERC Rule 292.202(g), (h), (i) and (j), dealing with "useful power output", "useful thermal energy output" and "total energy output".

The FPSC stated in the above opinion that FPC must purchase electricity offered for sale by Panda "in accordance with applicable law" (Florida Statutes § 366.051). "Applicable law" is the federal law and that implementing Florida law is not inconsistent with federal law.

There is nothing in PURPA or in the FERC regulations which make these size distinctions or allow them. Nothing in PURPA or the FERC regulations allow a state commission to control the *size* of a QF; the only "cap" is an 80 MW cap on the size of a qualifying *small power production facility* under 16 C.F.R. § 292.204(a). The criteria for qualifying *cogeneration* facilities, in contrast, at 16 C.F.R. § 292.205, deals only with efficiency standards; there is *no* size or capacity limitation on cogeneration facilities.

Even the Florida Code's Rule 25-17.0832(1) makes no distinction between firm capacity and energy produced and sold by a QF and purchased by a utility, as to the *type* of contract; that section of the Rule provides that such firm

capacity and energy used and sold will be " . . . pursuant to a *negotiated contract or a standard offer contract* subject to certain contractual provisions as to the quantity, time and reliability of delivery." Further, provisions of that Rule require that, within one working day of the execution of a *negotiated* contract *or* the receipt of a signed *standard* offer contract, the public utility has to notify the Commission's Director and, within 10 days after the execution or receipt of *either* type of contract, the public utility must file with the Commission certain reporting information, which is the *same* for both types of contracts. Subsection (c) of that Rule makes the distinction in size by stating that, *in lieu* of a separate and negotiated contract a QF under 75 MW *may* (not *must*) accept any utility's standard offer contract. The Rule goes on to state that QFs which are 75 MW or greater *may* negotiate contracts for the purchase of capacity and energy pursuant to subsection (2) of the Rule.

It is, therefore clear that the Commission cannot impose size or similar limitations on the QFs; or assert jurisdiction to construe and interpret contracts, negotiated or standard offer, after they have been signed and approved.

Further, the claim stated in FPC's petition has nothing to do with an interpretation of the Commission's Rules. On page 1 of FPC's petition for declaratory statement, FPC makes it very clear that it is seeking a Commission declaration that the standard offer contract of Panda "is not available" to Panda " . . . if it constructs a facility configuration, as it currently proposes to do, with the capacity to produce of 115 MW. In addition, if the standard offer contract is available to Panda, Florida Power seeks a further declaration that it has no obligation to make capacity or energy payments under the standard offer contract after December, 2016." (Exhibit C, January 25,

1995 Petition for Declaratory Statement, page 1). That petition clearly requests the Commission to interpret the contract and declare it either unavailable or economically unfeasible - goals which directly contradict and frustrate federal energy policy and law.

The rule that FPC claims needs interpretation is Florida Code Rule 25-17.0832(3)(a), which provides that, upon petition by a utility or pursuant to the Commission's action, each public utility shall *submit for Commission approval a tariff and a standard offer contract* for the purchase of firm capacity and energy . . ." *That process already occurred,* in August, 1991, *before* Panda entered into the contract with FPC. That rule has nothing to do with the approved contract subsequently executed by the parties in November, 1991; subsequently approved by the Commission in October, 1992; and subsequently performed by the parties for over two years.

There is no substance for FPC's petition; it is a sham. Moreover, even if it had any merit, it must be dismissed because the Commission lacks jurisdiction over one of the parties and over the subject matter, as a matter of law.

4. The Commission must address its lack of jurisdiction before any further steps can be taken in this proceeding; those activities must be stayed or abated.

Incredibly, having learned of Panda's intention to file this Motion to Dismiss, the staff proceeded to announce that it fully intended to see to it that a hearing on issues would proceed as scheduled this Thursday, September 14. FPC, also advised of the filing of this motion in a meeting of counsel in the federal case on September 5, proceed to

serve notice of its intention to take oral depositions, starting next Monday, September 18.

When the jurisdiction of a court or agency is put at issue — which can be done by the parties or the court or agency at any time — then the court or agency should not take any further actions until reply briefs are filed, and a proper determination of jurisdiction to made. All decisions and actions of a court or agency without jurisdiction are void and may be ignored. *See Stel-Den of American, Inc. v. Roof Structures, Inc.*, 438 So. 2d 882 (Fla. App. 1983).

Panda's motion to stay or abate this proceeding should be promptly granted and, after briefing and hearing, Panda's motion to dismiss should be granted.

Respectfully submitted,

THE LAW OFFICE OF
RAY G. BESING, P.C.
Ray G. Besing
State Bar Card 02262000
Timothy R. George
State Bar Card 07806950
1100 St. Paul Place
750 North St. Paul
Dallas, Texas 75201
tel: 214/220-9090
fax: 214/220/1202

TRIAL COUNSEL
FOR PLAINTIFF

FOWLER, WHITE GILLEN,
BOGGS, VILLAREAL AND
BANKER, P.A.

By:_____
Ken Sukhia
Florida Bar No. _____
101 N. Monroe Street
Suite 1090
Tallahassee, Florida 32301
tel: 904/681-0411
fax: 904/681-6036

LOCAL COUNSEL FOR
PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via Federal Express to Donald R. Schmidt, Esq., Carlton, Fields, Ward, Emmanuel, Smith and Cutler, P.A., One Harbour Place, 777 South Harbour Island Drive, Tampa, Florida 33602, attorney for Florida Power Corporation, and to Robert Vandiver, Esq., Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0862, attorney for Public Service Commission, on this 12th day of September, 1995.

_____

Ken Sukhia, Esq.

No. 97-1316

(3)

Supreme Court, U.S.
FILED
JUN 22 1998

In The

Supreme Court of the United States

October Term, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

vs.

FLORIDA POWER CORPORATION and FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION FOR RESPONDENT FLORIDA POWER CORPORATION

JAMES A. McGEE
JEFFERY A. FROESCHLE
Office of the General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733
(813) 866-5786

GARY L. SASSO
Counsel of Record
JAMES MICHAEL WALLS
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, Florida 33733
(813) 821-7000

Attorneys for Respondent Florida Power Corporation

145206

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, Inc.

QUESTION PRESENTED

In framing the supposed "Question Presented," Petitioner Panda-Kathleen, L.P., incorrectly states the nature of the relief sought and granted in the proceedings below. Florida Power did not ask the Florida Public Service Commission to "rewrite" and thereby "invalidate" the parties' contract. Instead, it asked the Commission to resolve the parties' dispute about the rules the Commission adopted to implement the Public Utilities Regulatory Policies Act of 1978 ("PURPA"). Those rules governed the Commission's approval of Panda's contract, and they were expressly incorporated as terms of that contract. Florida Power merely sought to have Panda comply with those rules and with PURPA, and that is all the Commission ordered below.

As a result of its material mischaracterization of the decisions below, Panda poses a "Question Presented" that is not presented by those decisions. Rather, the only question presented by them is:

> Whether the decisions below, which hold that Panda must comply with PURPA and the Commission's rules implementing PURPA, constitute "utility type" regulation preempted under PURPA.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Florida Power Corporation is Florida Progress Corporation and the following are its nonwholly owned subsidiaries:

Dixie Fuels Limited
Dixie Fuels II, Limited
Dulcimer Land Company
Electric Fuels Corporation
Elmwood Fleet, Inc.
Energy Services Projects
Gateway Joint Venture (Carillon)
Hatfield Dock & Transfer, Inc.
Hatfield Terminals, Inc.
Health Progress Joint Venture
HEB Partners
Highpoint Center Partners, Ltd.
Homeland Coal Company, Inc.
I.M.T. Land Corp.
International Marina Terminals Partnership
Kentucky May Coal Company, Inc.
Kodiac Coal Company, Inc.
Lake Port Properties
Lakeside Properties
Little Black Mountain Coal Reserves, Inc.
Little Black Mountain Land Company
Marine Equipment Management Corporation
Marine Equipment Towing Corporation
Meridian Land Company
Mid-Continent Life Insurance Company

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
A. Introduction.	1
B. PURPA and The Parties' Standard Offer Contract.	2
C. The Commission's Proceeding.	4
D. The Florida Supreme Court's Decision.	6
Reasons for Denying the Writ	7
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907 (D. N.J. 1997) 10

Contents

Page

FERC v. Mississippi, 456 U.S. 742 (1982) 6, 7, 8, 10

Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners, 44 F.3d 1178 (3d Cir. 1995) 9, 10

Indeck-Yerkes Energy Services, Inc. v. Public Service Com'n of State of N.Y., 564 N.Y.S. 2d 841 (N.Y. A.D. 3d 1991) 10

West Penn Power Co. v. Pennsylvania Public Utility Commission, 659 A.2d 1055 (Pa. Commw. 1995) . 10

Statutes Cited:

16 U.S.C. § 2633 8

Public Utilities Regulatory Policies Act § 210(a) 2

Public Utilities Regulatory Policies Act § 210(f) 3, 6

Rules Cited:

Florida Administrative Codes 25-17.080 through 25-17.091 3

Florida Administrative Code 25-17.0832(3)(a) 3

Florida Administrative Code 25-17.0832(3)(e)6 3

STATEMENT OF THE CASE

A. Introduction.

In November 1991, Petitioner Panda-Kathleen, L.P. ("Panda") entered into a contract with Florida Power Corporation ("FPC") by which Panda agreed to build a power plant and supply electricity to FPC. The parties entered into their agreement in accordance with the rules of the Florida Public Service Commission ("Commission") implementing the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), and those rules were incorporated by reference into the contract. A dispute arose concerning the Commission's rules, and the parties each filed petitions for a declaratory statement asking the Commission to resolve the dispute.

Acting on these petitions, the Commission interpreted its PURPA rules and resolved the dispute in FPC's favor. At the same time, the Commission extended the time that Panda had to build the plant and to commence providing electricity to FPC. The Florida Supreme Court affirmed the Commission's decision.

In its petition to this Court, Panda incorrectly asserts that "the Commission issued an order ruling that FPC's contract with Panda was *invalid*." (Pet. at 3) (emphasis added). Panda contends that the Florida Supreme Court

> approv[ed] Florida Power's attempt to escape its contractual duties under a cogeneration agreement that had been expressly approved by the Commission under regulations adopted to implement both PURPA and FERC's rules,

and Panda further contends that, by this supposed holding, the Court

> has transgressed upon the congressional mandate, and has announced a rule of law that irreconcilably conflicts with the decisional law announced by every federal and state court to have addressed the preemptive effect of PURPA.

(Pet. at 5). On this basis, Panda asks this Court to grant Panda's petition.

Panda's petition fundamentally mischaracterizes the decisions of the Commission and the Florida Supreme Court. They did *not* invalidate the parties' contract or allow FPC to "escape its contractual duties." To the contrary, FPC remained fully obligated under those decisions to purchase power from Panda in accordance with PURPA, and the Commission rules implementing PURPA, and the parties' contract. Accordingly, the issue that Panda purports to bring before this Court is not presented by the decisions below, which are in complete accord with congressional and regulatory directives and other decisional law.

B. PURPA and The Parties' Standard Offer Contract.

PURPA was enacted in 1978 as a measure to reduce the country's dependence on foreign oil. To achieve that goal, Congress sought to encourage the development of cogeneration and small power production facilities. (App., 78a). Specifically, Section 210(a) of PURPA directs the Federal Energy Regulatory Commission ("FERC") to promulgate rules to encourage the development of those alternative energy sources by requiring that every electric utility offer to purchase electricity from qualifying facilities ("qualifying facilities" or "QFs"). (App., 78a). In turn, however, PURPA provides that the rates for those purchases may not exceed the cost of the "electric energy which, but for the purchase from such [QF], such utility would generate

or purchase from another source," which is commonly referred to as the utility's "avoided cost." (App., 78a-79a).

Although QFs are provided a limited exemption from certain state regulation, they are *not* exempt from state laws and regulations *implementing* PURPA. (App., 79a-80a). Rather, Section 210(f) explicitly requires *each state* regulatory authority to implement FERC's PURPA rules. (App., 81a). Furthermore, FERC's rules exempt QFs only from state regulation respecting the "rates of electric utilities[] and . . . the financial and organizational regulation of electric utilities," (App., 97a), which is often described as the QFs' exemption from "utility-type regulation." FERC's rules specifically provide that this exemption does *not* apply to rules adopted by state regulatory bodies to *implement* PURPA. (App., 97a).

In Florida, the Commission implemented PURPA by enacting Rules 25-17.080 through 25-17.091, F.A.C. In order to provide a means by which "smaller" QFs can sell energy to utilities which have "superior bargaining power," the Commission's rules require all utilities to file standard offer contracts containing the terms for the purchase of electricity from small power producers with *facilities less than 75 MWs*. (App., 90a-94a, 31a). Certifying that it intended to construct a facility less than 75 MWs, Panda accepted FPC's "Standard Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility less than 75 MW. . . ." Pursuant to the Commission's PURPA rules, the parties' contract was approved by the Commission on October 22, 1992. (App., 20a).

Under Section 1.1.5 of that contract, Commission Rules 25-17.080 through 25-17.091 were expressly incorporated and made a part of the contract. Among those rules was Rule 25-17.0832(3)(a), which expressly limits the contract to a facility "less than 75 megawatts. . . ." (App., 90a). Rule 25-17.0832(3)(e)6 was also incorporated, which provides that

> [a]t a *maximum*, firm capacity and energy shall be delivered for a period of time equal to the anticipated plant life of the avoided unit, commencing with *the anticipated in-service date of the avoided unit.*

(App., 91a-92a). (emphasis added). The contract expressly defines the life of this unit as *twenty* years, and it contains a 20-year capacity payment schedule.[1] [*See* Contract Appendix C, Schedules 2 & 3].

C. The Commission's Proceeding.

FPC filed a petition for a declaratory statement with the Commission when it became apparent that Panda intended: (i) to build a 115 MW facility rather than the 75 MW facility it had represented it would build; and (ii) to seek payments from FPC for an additional ten years beyond the twenty-year life of the avoided unit. FPC sought an order resolving the dispute relating to the Commission's implementation of PURPA. Specifically, it asked the Commission to declare that Panda would not comply with the Commission's PURPA rules if Panda built a facility larger than 75 MWs and, further, that FPC was only obligated to make payments to Panda for the twenty-year life of the avoided unit. (App., 102a). FPC did *not*, as Panda has misrepresented to this Court at page 2, footnote 1, seek to *rescind* the contract. (*Id.*).

Thereafter, Panda filed a motion for declaratory statement of its own, seeking a determination that its construction of the

---

1. After receiving the standard offer contract from FPC, Panda typed in an expiration date based on a thirty-year term rather than the twenty-year life of the avoided unit. This was the *only* change Panda attempted to make to the contract and, as both the Commission and the Florida Supreme Court pointed out, it was contrary to the explicit requirement of PURPA that FPC pay no more under the QF contract than its costs under the avoided unit.

contract was consistent with the Commission's PURPA rules. Panda later moved to dismiss the proceeding, however, contending that PURPA preempted the Commission's jurisdiction over the issues that FPC and Panda had brought before the Commission. The Commission denied Panda's motion, concluding that the relief requested did "not conflict with federal regulations [implementing PURPA] or subject Panda to 'utility-type' regulation" in contravention of the limited exemption from state regulation provided under PURPA and FERC's PURPA rules. (App., 32a).

Following an evidentiary hearing, the Commission held that its PURPA rules limited standard offer contracts to facilities less than 75 MWs in size. Hence, Panda could not build a 115 MW facility without violating that rule, which was the basis for the Commission's approval of Panda's contract in the first instance and was expressly made a part of that contract. (App., 40a). The Commission further held that FPC was responsible for payments to Panda for the twenty-year life of the avoided unit, as provided in the Commission's rules. To require payments for thirty years, as Panda urged, "would exceed the avoided cost of the unit identified in the standard offer" contract "in violation of both [PURPA] and [the Commission's] rules for [QFs], which were implemented to ensure that utilities pay no more than the avoided cost to purchase capacity and energy from" such facilities. (App., 41a-42a).

Most significantly, and contrary to Panda's assertion (Pet. at 3, 10, 12-13), the Commission did *not* rule that Panda's contract with FPC was "invalid" and it did *not* "excus[e] the utility's performance altogether." (App., 35a-76a). Quite to the contrary, both parties remained obligated under the Commission's order to perform their respective duties under the contract. Indeed, the Commission expressly granted *Panda's* request that it be given additional time to perform its contractual obligations.

D. The Florida Supreme Court's Decision.

The Florida Supreme Court affirmed the Commission's order, holding that PURPA "contemplated and authorized" the Commission's exercise of jurisdiction over the dispute regarding its implementation of PURPA. (App., 6a). The Court emphasized that this decision was consistent with "the federal and state legislative enactments as well as the judicial decisions applying the statutes," which required the Commission to "bear the responsibility of resolving such disputes." (App., 9a).

In particular, this Court concluded in *FERC v. Mississippi*, 456 U.S. 742, 760 (1982) that state regulatory bodies are to "open their doors" to adjudicate PURPA claims. In a discussion of the role of state regulatory bodies under PURPA — a discussion conspicuously omitted from Panda's petition — this Court noted that Section 210(f) required "each state regulatory authority . . . to implement FERC's rules" and, further, that FERC's rules allowed state regulatory bodies "latitude in determining the manner in which the regulations are to be implemented." *Id.* at 751. This Court concluded that Congress could have opted to preempt the states completely under PURPA but did not do so; rather, Congress left to the states the discretion to determine how best to apply FERC's PURPA rules and thereafter resolve disputes relating to their implementation of PURPA.

The Florida Supreme Court relied specifically on this Court's decision in *FERC v. Mississippi*. Because the Commission implemented FERC's rules by adopting rules of its own in addition to adopting FERC's PURPA rules, the Florida Supreme Court reasoned that

> it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to

> construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations.

(App., 8a). The Commission's power to resolve conflicts regarding the implementation of its PURPA rules naturally followed from this Court's recognition in *FERC v. Mississippi* that the adjudication of such disputes under PURPA was the obligation of and "the very type of activity" commonly engaged in by state regulatory authorities. (App., 8a).

Finding that the Commission had properly construed its rules implementing PURPA, the Court affirmed the Commission's Order. In so holding, the Court emphasized that, under Panda's construction of those rules, the contract would have *violated* PURPA by requiring FPC to pay for capacity beyond the life of the avoided unit. (App., 11a).

REASONS FOR DENYING THE WRIT

This Court has held that, consistent with the provisions of PURPA and the FERC rules implementing PURPA, state regulatory authorities must implement PURPA and adjudicate disputes arising in connection with their regulations implementing PURPA. *FERC v. Mississippi*, *supra*. The Commission below did nothing more than resolve a dispute about its rules implementing PURPA. Faithfully applying this Court's decision in *FERC v. Mississippi*, the Florida Supreme Court held that the Commission was authorized under PURPA to resolve that dispute. That decision does not warrant review by this Court.

Panda relegates to a footnote the nature of the dispute between Panda and FPC under the standard offer contract. (Pet. at 2, n.1). In that aside, however, Panda concedes that its

construction of the contract was at odds with the Commission's rules implementing PURPA. (*Id.*). The Commission's resolution of that conflict — which resolution Panda repeatedly characterizes as "utility-type regulation" — is *not* that type of regulation at all. Nor did the Commission invalidate the contract and excuse FPC from its obligations, as Panda repeatedly charges. (Pet. 3, 10, 12-13). The commission's order could not be clearer in that regard.

The Florida Supreme Court concluded that the Commission had the right to resolve this dispute concerning the implementation of its PURPA rules:

> [w]e believe it would be contrary to both federal and state statutory authority directing the cogeneration program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and resolve conflicts concerning the implementation of those regulations.

(App., 8a). This conclusion "naturally flows" from *FERC v. Mississippi*, in which this Court ruled that PURPA allowed state regulatory commissions to adjudicate such disputes under PURPA. (App., 8a). As a result, the Commission had the responsibility to resolve the dispute over its rules implementing PURPA and, according to the Florida Supreme Court, correctly did so.[2]

---

2. Asserting that PURPA provides for judicial review of disputes "arising from Qf contracts" in the same manner that judicial review exists for parties to private contracts, Panda contends that the Commission's jurisdiction was preempted once it approved the Panda contract. (Pet. at 8). This is not, however, a simple dispute "arising from QF contracts." As the Florida Supreme Court expressly recognized, this is a dispute concerning the Commission's implementation of its rules under PURPA. (App., 8a). As such, PURPA permits judicial review in exactly the manner that the Florida Supreme Court reviewed the Commission's order. (App., 81a -82a); 16 U.S.C. § 2633.

The Florida Supreme Court correctly found Panda's authority to be inapposite. Discussing one of those cases, *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners*, 44 F.3d 1178 (3d Cir. 1995), which Panda again relies upon in its petition, the Court specifically noted that "[i]n *Freehold*, the board was not construing and implementing its own [PURPA] regulations." (App., 9a). Rather, that case indisputably involved "utility-type regulation" because the Board sought to require a QF to agree to the reduction of the utility's payments, in order to benefit the utility's ratepayers. *Id.* at 1183. That attempt "to either *modify the* [*contract*] or *revoke* [*the Board's*] *approval*," the *Freehold* court concluded, was preempted "utility-type" regulation. *Id.* at 1192 (emphasis added).

The Florida Supreme Court agreed that such "utility-type regulation" was preempted. Recognizing, however, that the Commission here had not sought to "modify" or "revoke" this contract but rather was merely construing and implementing its own PURPA rules, the Court held that the Commission had not engaged in preempted "utility-type regulation." (App., 9a).

Panda attempts to bring its claim within the scope of the "utility-type regulation" addressed in *Freehold* by mischaracterizing the decisions below. Panda asserts as fact that the Commission "issued an order ruling that [FPC's] contract with Panda was *invalid*" and "*excusing the utility's performance altogether.*" (Pet. at 3, 10, 12-13) (emphasis added). Even a cursory review of the Commission's order reveals that Panda's assertions are false.

The Commission did not "invalidate" this contract. It remained in full effect, with *Panda* being granted additional time to perform its obligations under the contract. Further, far from "excusing [FPC's] performance altogether," the

Commission specifically declared that FPC was obligated to make payments for the life of the avoided unit. (App., 35a-76a).

In sum, the Commission enforced PURPA and its rules implementing PURPA — which were expressly made a part of the contract by FPC and Panda — when Panda put forth a construction of the contract in conflict with those rules. Since *FERC v. Mississippi*, *supra*, courts and regulatory bodies have specifically recognized this is within state regulatory authority. *See, e.g., Indeck-Yerkes Energy Services, Inc. v. Public Service Com'n of State of N.Y.*, 564 N.Y.S. 2d 841, 843 (N.Y. A.D. 3d 1991); *Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc.*, 969 F. Supp. 907 (D. N.J. 1997).

As such, this case is very different from the cases Panda cites in its petition. All of the cases relied upon by Panda involved an effort to *terminate* or *modify* a previously approved contract, through "utility-type regulation." They do not address the states' jurisdiction to determine the very different type of issue presented here. For example, in *West Penn Power Co. v. Pennsylvania Public Utility Commission*, 659 A.2d 1055 (Pa. Commw. 1995), as in *Freehold*, the Commission had *not* been asked to enforce its rules implementing PURPA. Instead, the Commission was asked to *rescind* its prior order approving the contract, relief that clearly was preempted under PURPA. *Id.* at 1066. That was simply not the case here.

CONCLUSION

The Florida Supreme Court correctly held that the Commission had jurisdiction "to construe the regulations it has adopted in furtherance of [the PURPA] program and resolve conflicts concerning the implementation of those regulations." (App., 8a). The petition should be denied.

Respectfully submitted,

GARY L. SASSO
Counsel of Record
JAMES MICHAEL WALLS
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Progress Plaza
Barnett Tower, Suite 2300
200 Central Avenue
St. Petersburg, Florida 33733
(813) 821-7000

JAMES A. McGEE
JEFFERY A. FROESCHLE
Office of the General Counsel
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733
(813) 866-5786

Attorneys for Respondent
Florida Power Corporation

Supreme Court, U.S.
FILED
MAR 12 1998
CLERK

No. 97-1316

(4)

In The

Supreme Court of the United States

October Term, 1997

PANDA-KATHLEEN, L.P.,

Petitioner,

vs.

FLORIDA POWER CORPORATION and FLORIDA PUBLIC SERVICE COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION FOR RESPONDENT FLORIDA PUBLIC SERVICE COMMISSION

ROBERT D. VANDIVER
Counsel of Record
RICHARD C. BELLAK
FLORIDA PUBLIC SERVICE COMMISSION
Attorneys for Respondent Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6092

145211

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

18 pp

QUESTION PRESENTED

Respondent, Florida Public Service Commission (FPSC or Commission) believes that the question presented by Panda's Petition is not presented by the cases cited therein and that Panda has not identified any actual conflict between those cases and the FPSC's order affirmed by the Florida Supreme Court. Instead, the question presented by Panda's petition is as follows:

> Whether Panda has identified an exemption whereby state regulatory authorities can be preempted from implementing the rules they adopted pursuant to the Public Utilities Regulatory Policies Act of 1978 [PURPA], as required by section 210(f) of that Act.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. The Florida Power Corporation/Panda Kathleen Contract.	1
B. The Florida Supreme Court's Decision.	2
Reasons for Denying the Writ	3
I. This Case Implicates The Implementation Aspect Of PURPA, Not Preemption.	4
II. The Florida Supreme Court's Interpretation Upholding FPSC's Ability To Resolve Disputes Concerning Its PURPA Implementation Rules Is Consistent With Every Federal And State Court Interpretation Of PURPA, Including Those Cited By Panda.	7
III. Panda Has Identified No Conflicting Precedents Nor, *A Fortiori*, A Need To Resolve Them.	12
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

American Paper Institute v. American Elec. Power, 461 U.S. 402 (1983) 10

FERC v. Mississippi, 456 U.S. 742 (1982) 4, 6, 10, 13

Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of State of New Jersey, 44 F.3d 1178 (3rd Cir.), *cert. denied*, __ U.S. __, 116 S. Ct. 68 (1995) 8, 9, 10, 13

Erie Energy Associates, 1992 N.Y. PUC LEXIS 52 .....9, 10, 13

Independent Energy Producers Association, Inc. v. California Public Utilities Commission, 36 F.3d 848 (9th Cir. 1994) 7

Kamine/Besicorp Allegheny L.P. v. Rochester Gas & Electric Corp., 908 F. Supp. 1180 (W.D. NY 1995) 10, 11

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) 12, 13

Rosebud Enterprises v. Idaho Public Utilities Commission, 917 P.2d 766 (Idaho 1996) 10, 11

Contents

	Page
Smith Cogeneration Management, Inc. v. Corporation Commission, 863 P.2d 1227 (Okla. 1993)	8
West Penn Power Co., 71 FERC ¶61,153 (1995)	11
Statutes Cited:	
16 U.S.C. § 824a-3(b)	5
16 U.S.C. § 824a-3(e)(3)(A)	2, 3
16 U.S.C. § 824a-3(f)	1
16 U.S.C. § 824a-3(g)	6
28 U.S.C. § 1257(a)	4
Communications Act § 152(b)	12
Florida Statute § 366.051	1
Public Utilities Regulatory Policies Act § 210(f)	1, 9, 13
Rules Cited:	
Federal Rule of Evidence 201(b)	2
Rule 25-17.0832(3)(a), Florida Administrative Code	1
Rule 25-17.0832(3)(e)6, Florida Administrative Code	1

STATEMENT OF THE CASE

A. The Florida Power Corporation/Panda Kathleen Contract.

Panda and Florida Power entered into, and the FPSC approved[1], a standard-offer contract which required compliance "with FPSC Rules 25-17.080 through 25-17.091 in effect as of the Execution Date". (Pet. App. at 24a). This case concerns Panda's attempts to evade two of those rules, which the FPSC adopted to implement PURPA. (Pet. App. at 7-8a). The first, Rule 25-17.0832(3)(a), limited the availability of these standard offer contracts, including Panda's, to "contracts for the purchase of firm capacity and energy from *small qualifying facilities less than 75 megawatts* . . .". [e.s.] (Pet. App. at 2a, 24a, 90a). The second, Rule 25-17.0832(3)(e)6, limited the duration of firm capacity and energy delivery from a qualifying facility, such as Panda, to a utility, such as FPC, to, "*[a]t a maximum* . . . the anticipated plant life of the avoided unit . . ." [e.s.] (Pet. App. at 2a, 25a, 91-92a). Schedule 2 to Appendix C of this contract identified the economic plant life of the avoided unit as equal to 20 years. (Pet. App. at 2a, 24-26a).

As authorized by Section 366.051, Florida Statutes, these two rules were adopted by FPSC pursuant to the requirement of § 210(f), 16 U.S.C. § 824a-3(f), that each state regulatory authority implement the Federal Energy Regulatory Commission's [FERC] PURPA [Public Utilities Regulatory Policies Act of 1978] rules concerning cogeneration. (Pet. App. at 7-8a, 80-81a). Such state "PURPA implementation" rules, including the two FPSC rules just discussed, are *not preempted*, and *PURPA forbids exemption* of qualifying cogeneration facilities from compliance with them. (Pet. App. at 5a, n.1.) To

---

1. FPSC approved the contract October 22, 1992. (Pet. App. at 2a.)

summarize, this FPSC approved contract required, pursuant to the two PURPA implementation rules enacted by Florida discussed above, that the net generating capacity of Panda's plant not exceed 74.9 MW and that the duration of firm capacity and energy delivery from Panda to FPC not exceed 20 years. Federal law, in turn, required that Panda *not be exempted from these state rules*. 16 U.S.C. § 824a-3(e)(3)(A) (1994). Against this backdrop, the litigation took place which is described, although inaccurately, by Panda in its Petition.

B. The Florida Supreme Court's Decision.

As noted by the Florida Supreme Court, the litigation began when Florida Power petitioned the Commission in 1995 alleging that, despite these rules, Panda planned to build a 115 MW plant and claimed the right to deliver 30 years, rather than 20 years, of firm capacity and energy to Florida Power. (Pet. App. at 1-3a.)

Given the facial inconsistency between the parameters established by state rules Panda admits were incorporated in the contract, Petition, p. 2 n.1, and Panda's plan to build a larger plant than the rules permitted and deliver firm capacity and energy for 10 years longer than the rules permitted, it is not surprising that both the FPSC and the Florida Supreme Court rejected Panda's arguments. For its part, Panda apparently decided to make up for a case lacking on the merits with a proliferation of theories concerning preemption. The version this Court now has before it is only the latest of many attempts by Panda to fit preemption theories to facts and law which have nothing to do with those theories.[2]

---

2. Pursuant to Federal Rule of Evidence 201(b), the Court may take judicial notice that Panda's latest version of its preemption theory, *i.e.*, that the FPSC *invalidated Panda's contract*, is at odds (Cont'd)

REASONS FOR DENYING THE WRIT

While FERC has promulgated rules exempting cogenerators from certain forms of state regulatory control, specifically, laws and regulations respecting the *rates*, or respecting the *financial or organizational* regulation of electric utilities, Panda has not identified any connection between these limited preempted areas and the dispute resolved by the Florida Supreme Court in the challenged decision. (Pet. App. at 1-12a.) Moreover, the FPSC was required to implement PURPA in Florida and, by operation of federal law, neither Panda nor any other cogenerator may be exempted from compliance with FPSC's PURPA implementation rules, including the two rules at issue in this case. (Pet. App. at 5a, n.1) (16 U.S.C. § 824a3(e)(3)(A) (1994)). Indeed, the authorities that address this issue, including those relied on by Panda, carefully differentiate conflicts involving the preempted areas of rates and financial or organizational regulation from those which concern state PURPA implementation rules.

(Cont'd)
with Panda's current representations to the FPSC. In Panda's *Motion For Extension Of Contract Performance Dates*, filed with FPSC January 6, 1998, and still pending, there is no hint that Panda believes the contract to have been invalidated. As stated therein by Panda,

> The bona fide dispute between the parties was not resolved until conclusion of the proceedings in the [Florida] Supreme Court.
>
> Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling.

Motion, p. 1. Apparently, Panda's Petition amounts to nothing more substantial than a litigant hedging its bets.

Because Panda fails to differentiate the preemption category from the state PURPA implementation rules category, it is Panda's arguments which irreconcilably conflict with the decisional law announced by every federal and state court to have addressed these issues. There is, in fact, no disharmony whatever resulting from the decision of the Florida Supreme Court challenged here and, therefore, no threat to carrying out Congressional intent which could commend this matter to the Court's attention.[3]

I.

THIS CASE IMPLICATES THE IMPLEMENTATION ASPECT OF PURPA, NOT PREEMPTION.

As noted earlier, Panda's discussion of state preemption in the abstract comes up short for lack of any connection between the subject matter of this case and the two areas in which the states are preempted, namely rate regulation and financial or organizational regulation.

In this case, Panda's participation in the standard offer contract was subject to, *inter alia*, two conditions incorporated as contract terms by state rules implementing PURPA. First, the plant could not exceed 74.9 MW in net generating capacity. Second, Panda could not select a term of firm capacity and energy delivery exceeding 20 years. Neither of these conditions implicates the two exempt areas. Instead, only the rules adopted by the FPSC to implement PURPA are implicated.

As this Court noted in *FERC v. Mississippi*, 456 U.S. 742, 751 (1982),

---

3. Panda also fails to provide any reasoning supporting its one-sentence allegation of jurisdiction pursuant to 28 U.S.C. § 1257(a). Petition, p. 1.

> FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. These afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented. Thus, a state commission may comply with the statutory requirements by *issuing regulations*, by *resolving disputes* on a case-by-case basis, or by *taking any other action reasonably designed* to give effect to FERC's rules [e.s]

Here, Florida exercised its latitude in determining the manner in which to implement FERC's regulations by *issuing a regulation* providing *small QFs less than 75 MW* with special encouragement through the availability of standard offer contracts. FPSC then *resolved a dispute* regarding its implementation of PURPA which arose when Panda claimed that a 115 MW plant it intended to build would be consistent with the "small QF less than 75 MW" standard in that regulation, or, alternatively, that the regulation was irrelevant. The Commission rejected Panda's assertions and the Florida Supreme Court affirmed. As noted by FPSC, a plant designed to produce 115 MW, such as Panda announced in 1995 that it planned to build, was ineligible for participation in the standard offer contract which FPSC had approved between Panda and Florida Power in 1992.

Similarly, Florida implemented FERC's regulations, 16 U.S.C. § 824a-3(b), constraining payments by utilities to cogenerators at "avoided cost" by, *inter alia*, *issuing a regulation* providing that, at a maximum, the duration of firm capacity and energy delivery from a cogenerator to a utility could not exceed the plant life of the avoided unit. The Commission then *resolved a dispute* regarding its implementation of PURPA which arose when Panda claimed that it was entitled to provide 30

years of firm capacity and energy rather than for the 20 year plant life of the avoided unit in the contract, or, alternatively, that the regulation was irrelevant. FPSC rejected Panda's assertions and the Florida Supreme Court affirmed. As noted by FPSC, the Commission only had authority under PURPA to approve a firm capacity and energy term lasting no longer than the life of the avoided unit (in this case, 20 years) and Panda's attempt to extend the term by typing in a termination date which included 10 additional years was ineffective to avoid that provision of PURPA.

Far from having been preempted, as Panda claims, FPSC, in issuing these two regulations and then resolving the disputes about them described above, did just what this Court described in *FERC v. Mississippi* as appropriate state implementation of FERC's PURPA rules. While 16 U.S.C. § 824a-3(g) does set out the form of *judicial* review available for state PURPA enforcement, it nowhere preempts the resolution of conflicts regarding implementation of the states' PURPA rules represented by FPSC's order as affirmed by the Florida Supreme Court. Since FERC was not reticent about preempting those areas it intended to preempt, the lack of any preemption as to state administrative implementation of state PURPA rules is dispositive.[4] To re-paraphrase Panda's inaccurate summary of the law into one that is accurate, "Congress did not declare, and rationally could not have directed", that state regulatory bodies be given the responsibility to implement PURPA while preempting their ability to resolve disputes about the very rules they adopted to implement PURPA. In short, FPSC was not preempted from issuing an order declaring that, contrary to

---

4. As demonstrated by Panda's current filings before the FPSC, FPSC did not, contrary to Panda, allow the utility to "escape the very contracts PURPA fostered". n.2, *supra*. What FPSC did was to require adherence to the *PURPA implementation rules* incorporated as terms of the contract.

Panda, building a 115 MW plant was inconsistent with the state imposed 74.9 MW limit in the rule and delivering 30 years of firm capacity and energy was inconsistent with the state imposed 20 year limit in the rule.

II.

THE FLORIDA SUPREME COURT'S INTERPRETATION UPHOLDING FPSC'S ABILITY TO RESOLVE DISPUTES CONCERNING ITS PURPA IMPLEMENTATION RULES IS CONSISTENT WITH EVERY FEDERAL AND STATE COURT INTERPRETATION OF PURPA, INCLUDING THOSE CITED BY PANDA.

In attempting to find support for its position, Panda cites a number of cases in which state regulatory bodies have been preempted for attempting to act in the preempted area of rate regulation. However, none of these cases involves the resolution by a state regulatory body of conflicts arising out of the *state rules implementing PURPA*. Therefore, these cases are irrelevant to this case.

For example, *Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994), involved the CPUC's attempt to formulate a system under which QFs were identified as complying or non-complying with federal regulations and *compensated at different rates* based on that status. This did not implement PURPA, which accorded FERC the exclusive responsibility to certify QF status and gave no *rate regulation* capacity to states based on their assessment of any particular cogenerator's QF status as complying or non-complying. Accordingly, the state activity was found by the Ninth Circuit to be preempted.

Similarly, *Smith Cogeneration Management, Inc. v. Corporation Commission*, 863 P.2d 1227 (Okla. 1993), involved, not PURPA implementation, but instead, a notice provision of continuous rate regulatory supervision by the Oklahoma Commission, something quite obviously implicating the preempted area of rate regulation. Accordingly, the Oklahoma Supreme Court reversed the order.

Indeed, the case most heavily relied upon by Panda, *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of State of New Jersey*, 44 F.3d 1178 (3rd Cir.), *cert. denied*, __ U.S. __, 116 S. Ct. 68 (1995), illustrates again the total irrelevance of Panda's case citations. Could the New Jersey BRC's attempt to tailor rates paid the QF to changing conditions over time possibly be considered implementation of state PURPA rules? Surely not. It would be difficult to find a clearer case of activity implicating the preempted area of rate regulation and, not surprisingly, the Third Circuit found the activity to be preempted. However, *Freehold* is not only irrelevant to Panda's attack on the Florida Supreme Court's opinion, but a powerful case in support of that opinion. In arriving at the conclusion that the New Jersey BRC's activities were preempted, the Third Circuit provided a careful analysis to assure itself that there was no issue concerning the state's PURPA implementation rules, such as those at issue in this case, involved in *Freehold*:

> There is no dispute here that section 210(f) [of PURPA] gives state regulatory authorities power to implement the requirements of section 210(a) and the relevant regulations. In fact, both section 210(e)(3) and the applicable regulation, 18 C.F.R. s. 292.602(c)(2), expressly limit the exemptions from state law that QFs enjoy under §§ 210(e): *QFs simply are not exempt from state laws and*

> *regulations enacted pursuant to s. 210(f) and, with it, s. 210(a).* [e.s.]

44 F.3d at 1191-2. Since both PURPA implementation rules at issue in this case were adopted by Florida pursuant to § 210(f), the *Freehold* analysis verifies that Panda simply is not exempt from them and FPSC's order to that effect, affirmed by the Florida Supreme Court in the decision Panda challenges, *is not preempted.*

Like *Freehold*, *Erie Energy Associates*, 1992 N.Y. PUC LEXIS 52, may at first appear to support Panda's theory that all post-approval state regulatory activity is automatically preempted and that all "contract disputes" must be handled by the courts:

> Jurisdiction under the Public Utility Regulatory Policies Act of 1978 (PURPA) and PSC § 66-c is generally limited to supervision of the contract formation process. Once a binding contract is finalized, however, that jurisdiction is usually at an end. *n.1.* [e.s.]

However, the footnote is fatal to the attempted application of Panda's theory to this case and, as in *Freehold*, the analysis powerfully supports FPSC's position:

> n.1. *Continuing jurisdiction* [by the NYPSC] *is exercised* only *over* a few *contract clauses*, generally where *required by* statute or *regulation.* [e.s.][5]

---

5. Such *state imposed* contract clauses would have been relatively few in the negotiated contract at issue in *Erie*, but are more numerous in the standard offer contract at issue here, a contract accurately described as "state-controlled".

"Contract clauses required by regulation" describes perfectly the two FPSC rules incorporated into Panda's standard offer contract at issue in this case. *Erie* is therefore perfectly in accord with FPSC's "continuing jurisdiction" to implement those rules, and not at all in accord with Panda's claim that the Commission was preempted or that all disputes regarding contract clauses required by rules implementing PURPA must be left to the courts.

By the time this matter was presented to FPSC in 1995, both rules at issue had been in effect over an extended period. The issue presented was FPSC's administrative construction of two of its PURPA implementation rules. For Panda to claim that this particular dispute must have been adjudicated by a court rather than by the Commission or that the Commission was preempted from doing so is contrary to the relevant analyses in *Freehold* and *Erie* noted previously. That claim is also directly contradicted by this Court's explicit holding concerning resolution of disputes by state regulators in *FERC v. Mississippi*.

Finally, *American Paper Institute v. American Elec. Power*, 461 U.S. 402 (1983), *Kamine/Besicorp Allegheny L.P. v. Rochester Gas & Electric Corp.*, 908 F. Supp. 1180 (W.D. NY 1995) and *Rosebud Enterprises v. Idaho Public Utilities Commission*, 917 P.2d 766 (Idaho 1996), do not support Panda's claim of conflict either. The contract which Panda signed and the Commission approved in 1992, was, by its terms, conditioned on compliance with the two rules incorporated therein. By operation of one of those rules, 20 years was established as the plant life fully avoided by Panda's delivery of firm capacity and energy. Thus, the order affirmed by the Florida Supreme Court does not conflict with *American Paper*. Instead, Panda's claim to a 30 year duration of firm capacity and energy delivery, exceeding by 10 years the life of the avoided unit, not only conflicts with *American Paper*, but with PURPA

itself, as noted by the Florida Supreme Court. (Pet. App. at 11a.) (*See also Rosebud, supra*, at 780: "If parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered void ab initio.")

Panda can take no comfort either in the *Kamine/Besicorp* and *West Penn* opinions. Those cases do not encompass this case, where Panda signed a contract signifying its intent to comply with FPSC's rules incorporated therein and then viewed the state approval thus secured as the starting point to repudiate these rules and to litigate toward a larger plant and longer contract duration than those PURPA implementation rules allow. Any doubt that Panda's strategy is thus accurately described must give way based on comparing Panda's *current* representations to FPSC with its petition to this Court. In its pending *Motion For Extension of Contract Performance Dates* before FPSC, Panda states,

> Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling.

n.2, *supra*. Panda makes this representation to FPSC even as it petitions here — without any support — to *litigate away* the final order affirming the Commission's ruling. Moreover, it was in the same *West Penn* litigation inappropriately referenced by Panda that FERC held, "*it is up to the States*, not [FERC], *to determine the specific parameters of individual QF power purchase agreements* . . ." [e.s.] *West Penn Power Co.*, 71 FERC ¶61,153 (1995). *That* is the principle with which Panda has been at odds in various fora since 1992. It is a principle unrelated to preemption in whatever formulation Panda has theorized about it.

III.

PANDA HAS IDENTIFIED NO CONFLICTING PRECEDENTS NOR, *A FORTIORI*, A NEED TO RESOLVE THEM.

Panda's concluding rhetorical peroration about the threats to PURPA brought on by changes in the electric power industry, whether right or wrong, is unrelated to the facts and law of this case. The order challenged by Panda *implements PURPA*, apparently to Panda's chagrin. Panda wants to build a larger plant than Florida's PURPA rules permitted to standard offer contract participants and to exceed the avoided cost ceiling mandated by Congress by delivering 30 years of firm capacity and energy to avoid construction of a 20 year plant.

Moreover, neither FPSC nor the Florida Supreme Court has "invalidated" Panda's contract, as Panda has misrepresented in its Petition. Had that been the effect of FPSC's ruling, Panda would not currently be filing motions before FPSC asking for an extension of *contract performance dates* and stating,

> Panda is willing to abide by the final order and build the power plant in accordance with the Commission's ruling.

n.2, *supra*.

Panda's attempt to rely on *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), is the final irony, since that case represents the model for rejecting the kind of overly-broad claims of federal preemption that Panda asserts here. In *Louisiana*, this Court noted that express jurisdictional limitations on FCC power contained in § 152(b) of the Communications Act of 1934

> fences off from FCC reach or regulation intrastate matters . . .

Similarly, as this Court held in *FERC v. Mississippi*, the fact that certain specified areas of state utility regulation have been preempted in PURPA cannot be broadened to create preemption as to unrelated matters, such as a state agency's ability to implement its own PURPA rules enacted pursuant to § 210(f) by resolving disputes on a case-by-case basis. *Louisiana* is in accord, not in conflict, with that principle, as are *Freehold* and *Erie*. The fact that the other cases discussed do not concern disputes about state PURPA implementation rules at all does not mean that they can be portrayed as conflicting. Again, ironically, the only threat here to implementing Congress' will is in Panda's arguments, since Congress could not have intended that the states be made responsible for implementing PURPA and at the same time be preempted from resolving conflicts over the very state rules by which PURPA is implemented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT D. VANDIVER
Counsel of Record
RICHARD C. BELLAK
FLORIDA PUBLIC SERVICE COMMISSION
Attorneys for Respondent
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6092